

A MANUAL

OF

HINDOO LAW

AS

PREVAILING IN THE PRESIDENCY OF MADRAS.

BY

THOMAS LUMISDEN STRANGE, ESQ.

JUDGE OF THE HIGH COURT OF JUDICATURE AT MADRAS.

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PREFACE.

The following Manual, as it will be apparent, has been designed to supply, prominently to the legal profession, a succinct and easy guide to the practice of the Hindoo Civil Law. The work was first put forward in the year 1856. The basis of it is my father Sir Thomas Strange's well known production entitled "The Elements of Hindoo Law;" published originally in 1824. Sir Thomas Strange examined every treatise on the law accessible to him, and every judicial declaration or opinion, whether by the Courts of Justice or by the official Pundits, solving or announcing the law. He also sought all living assistance from those who had made the law their study of which he could avail himself. He felt that he was travelling over ground hitherto imperfectly explored, and in presenting himself to others as a guide, he took every precaution against proving an erroneous one. His efforts have been well approved, and his work has been everywhere accepted as of standard excellence. I have endeavoured to follow in his footsteps so far as to extend

the information he has supplied by what has been brought to light, chiefly through the operations of the Courts, from his time to the present day.

I have not attempted to emulate Sir Thomas Strange in the style or structure of his work. His enunciation of the law is interspersed with examinations of its bearings, spirit, and purpose, and comparisons with the laws of other people than the Hindoos, and prominently with the ancient Roman Civil Law, and the Laws of England. Such a task, once well performed, requires no repetition. At the outset, when the subject was comparatively a novel one to the European mind, disquisitions, such as Sir Thomas Strange has entered upon, had a special value, and they will ever retain their importance to those who seek instruction in the principles of the law. I have aimed merely at practical results, presenting, to those who have to use the law, the exact provisions they may seek to guide themselves by, so far as I have been able to ascertain them.

In doing this I have necessarily had to represent my own views of the law where I have been unable to accept the ideas of others. I could not have been true to my subject had I endorsed as the law that which I had reason to believe was not really the law. In this manner I have had occasionally to differ from Sir Thomas Strange, from the judgments of the Law Courts, and even from the official Pundits. When such difference has arisen I have

endeavoured briefly to support myself with the reasons that have led thereto.

The ascertainment of the Hindoo Law, from its original sources, is a task not to be entered upon, with any hope of success, by a European, and scarcely by a native of the present day. Nothing, apparently, in many instances, can be wider or more arbitrary, when judged of by modern lights, than the commentaries offered upon primitive texts. We may, however, with safety accept, as true representations of the law, those commentaries which have been accepted for ages passed, the force of which has asserted itself by continual usage. But to pursue any such system of interpretation in the present day would obviously be most dangerous. It is chiefly where I have thought the official Pundits following such a method, that is unsettling accepted and even declared law by further developments of their own, that I have been unable, whether on the bench or in this my private capacity, to adopt their conclusions. The causes of what I have conceived to be error in others than the Pundits are traceable, so far as I can judge, chiefly to the confounding obsolete with existing law, and Bengal with Benares law, and to the influences of foreign, that is English prejudice. I may add, however, with satisfaction, that the occasions are but few wherein I have had thus to differ with others.

It may be useful to trace out some of the circumstances which have influenced the law in its essential character or in its application. If we see how the law has been acted upon by external causes, so as to be varied or altered, we can the better watch those operations the tendency of which is to interfere with the law, and guard against their prevalence in undue or hurtful degree.

The law has extended itself to others than those for whom it was originally designed. There are families upon the Western Coast of this Presidency who, although by religion Mahomedans, have accepted the very peculiar rule of inheritance prevailing among the Hindoos by whom they are surrounded. That part of the country has by geographical position been very much cut off from the rest of the Presidency, and distinctive usages have there consequently obtained. The early Mahomedan settlers, or converts, originally few in number and greatly isolated, felt the force of local influences in a degree to which otherwise they would not have been subjected, and yielded thereto. Christians of pure Hindoo stock, over all parts of the Presidency, have also adopted the Hindoo law for the governance of their rights in property. Having no other law to serve them, their recourse to the law existing around them was but natural. Lastly, those Hindoos who by reason of laxity of morals, breach of religious obligation, personal illegitimacy, or other cause,

were degraded in caste and placed beyond the proper pale of the law, have formed communities of themselves, known by distinctive appellations, and these have voluntarily adhered to the law, so far as it suited them.

The ancient law has become obsolete chiefly in matters connected with marriage and affiliation. Formerly, Brahmins might inter-marry with any of the castes below them, and out of such unions arose divergencies in allotting portions and in estimating the religious value of the offspring. Now the Brahmins are restricted, as all others, to intermarriage with those of their own caste. The exact degrees of consanguinity, laid down by law, within which marriage could not be contracted, stretching to any one descended from an ancestor sixth in ascent above the father, have in practice been relaxed, and the bar now extends only to those who stand, in relative position, in the light of parents, brethren, and offspring. There were formerly no less than twelve different forms of affiliation, and a child might become in legal sense the offspring of two fathers, the natural and the adoptive father. Now there is but one form of affiliation to supply the want of a natural son, namely the adoption of a son received for the purpose in gift, and the son so taken belongs purely and solely to his adoptive father. The principle that the boy adopted should be one who might legally have been begotten, that is one whose mother the per-

son adopting him might have married, has been so far departed from in South India that usage has sanctioned the adoption of a daughter's or a sister's son.

These changes have been evidently wrought by natural feelings operating to break down arbitrary and fictitious legal refinements, and they may be said therefore to be of a healthy order. It is marvellous that the primitive law, projected in ages so remote as to be almost beyond the bounds of true history, should in the course of time have been subjected to so little alteration.

In Bengal, however, the law has not been so stable as in the other parts of India. There usage has been allowed largely to invade the written law, and this under a directly recognized principle, the effect of which, if carried to its true extremity, would be to break down all law. "A fact," says their great authority the Daya Bhaga, "cannot be altered by a hundred texts;" or, in other words, personal convenience is to be the law to every man. Society has of course not permitted itself to run riot to this extent, but where the exact demarcations of the law are not well maintained, uncertainty and confusion must ensue. In Bengal, more than elsewhere, a class of interpreters have sprung up who govern the written law by their own ideas, projected as interpretations of the true intent of the law. Where mere opinion is allowed such latitude, conflict will of course largely

prevail. The digest of Jaganatha, compiled under the auspices of Sir William Jones, affords notable evidence of the condition to which the law of Bengal has been reduced by its interpreters; and thence has arisen the bad repute of the law, deserved in great measure in Bengal, but undeserved in the rest of India, of which it has been too often unfairly and ignorantly asserted, that you may find a text, and a Pundit, in support of every conceivable position of law, however discordant.

The British Government have exercised with moderation the power they possess to interfere with the Hindoo, as with any other local law, by fresh legislation. The re-marriage of widows has been permitted, a liberty, however, apparently little likely to be used. Those who forfeit their caste, whether by change of faith or from other cause, have their civil rights preserved to them, whereas by Hindoo law they would forfeit all such rights, being considered civilly dead. A law of limitations has been prescribed for subjects of all denominations, Hindoos inclusive, to govern their right of action, superseding thus the provisions of the Hindoo law on the subject. These enactments, obviously, are all of a warrantable nature.

The law has also been influenced, and in some respects actually changed, by the operations of its proper guardians, the Courts of Justice.

In one instance it has been the application of the law,

rather than the law itself, that has been thus affected. The theory of a Hindoo family is that of unity. The head of the family controuls the common interests and makes provision for every member. At the same time any member may claim the separate allotment to him of his estimated portion in the inheritance, and thenceforth act for himself independently of the rest of the family. Thus stands the law undoubtedly; but before British rule was established it was rarely that a junior sought to enforce his independent right. He could do so only by braving public opinion in an appeal to an informal, and it may be said patriarchal ruler, and only under stringent necessity would such an appeal, ordinarily, be made. The power to divide was a provision wholesome in itself when resorted to as a remedy against unfair usage by the head of the family, or when a family and their possessions became of unwieldly proportions; but if exercised arbitrarily, and unrestrainedly, under the mere influence of a desire for independence, without consideration of the interests of the family at large, the law, so applied, would prove the reverse of beneficial. Under the system of judicature established by the British Government this injurious use of the law has ensued. The suitor in the British Courts meets with no such obstacles or restraining influences as would present themselves to him when seeking before a native power to divide himself from the head

of his house. He has been taught repeated lessons of self interest, as ascertainable by his individual mind, when permitted to pursue his own bare rights, as given to him by the law, irrespective of others. He may prosecute his case, himself unseen, through a professional agent. He meets with no remonstrances, and no questionings. The Law Court, in the driest manner, gives him what the law allows, and the disruption of the family is completed. This noxious practice is now daily pursued, and the consequence is social disunion, litigation, and pauperism. In one province of Madras, namely Malabar, the law is happily otherwise. There division must be effected by mutual consent, and cannot be enforced at law. And there are to be found, as the ordinary rule, ancient family fellowships and extensive consolidated possessions. The contrast with the rest of the Presidency, Canara excepted where the law of Malabar is more or less observed, is very remarkable, endless sub-divisions of the patrimony having brought in all the evils of disunion and pauperism inherent to such a system.

The bad tendency of the law, when thus mis-used, is not without easy remedy. The instrumentality we have raised up to enforce the law having proved unsuitable to its healthy operation, it would be quite warrantable to place that instrumentality under proper limitation; and without exactly altering the law, it might be declared

that the judicial tribunals should not be permitted to enforce division but upon proof that the interests of the party seeking the division required protection from waste or fraud on the part of the managing head of the family. It is thus only that division on the part of a minor can be effected at law, and the same rule, where the circumstances so loudly call for the reservation, might fairly be extended to all.

With the evil above pointed out, consisting in the mis-direction, by the people themselves, of a provision of their law, the dispensers of the law are assuredly not chargeable. But in other instances, these, whose duty it was to preserve the law, have certainly been guilty of a mis-direction of their powers in breaking it.

I refer now prominently to their putting in force testamentary dispositions by Hindoos, a power, in the sense known to us, not simply unconferred upon the Hindoo by his law, but absolutely and advisedly withheld from him. Want of proper acquaintance with the law no doubt originally led to this error, but with their eyes opened to the real state of the law, neither English prejudice, nor misguiding precedents, should have served to arm British judges in maintaining an open violation of the law.

As we recede from the true sources or scene of information, and fall within the proper sphere of English ideas, the instances of invasion of the law by British tribunals

multiply. With the decisions of Her Majesty's Supreme Court at Madras I have not seen occasion to occupy myself; nor are they published. It is, however, sufficiently notorious that on questions of Hindoo law they have been faulty, and with both judges and practitioners ordinarily ignorant of the law, and with no pundits, or experts, to assist them, the result could scarcely have been otherwise. The decisions of Her Majesty's Judicial Committee of the Privy Council are published, and my object being to assert the law, I have not hesitated to point out occasions, arising upon Madras cases, wherein that august tribunal, in following out ideas springing from themselves in a place so remote from the people whose law is there judged of, have, in my opinion, been betrayed into serious disturbance of the law.

On the whole, however, considering the minuteness and intricacy of the subjects of the Hindoo Law, that its precepts are shut up in books accessible to but few, that one author has to be referred to for the meaning of another author, that the whole often may not be understood but by recourse to living commentators, it is a source of satisfaction that, at least in the Presidency of Madras, the law, although administered by strangers to the people, has been ascertained and ordinarily recognized with so little apparent mis-apprehension of its true requirements.

T. L. STRANGE.

Madras, March 1863.

EXPLANATION OF ABBREVIATIONS.

Where figures are given thus, I. 315, the work referred to is Sir Thomas Strange's Elements of Hindoo Law.

Where the letters C, S and E are appended to such figures, the names of Colebrooke, Sutherland and Ellis are intended as special authorities cited in the above work.

S. D. A.—the Sudder Dewany Adawlut of Bengal.

Provl. Ct. N. D.; S. D.; C. D. and W. D.—the late Provincial Courts of the Northern, Southern, Centre or Western Division.

Pro.—Proceedings.

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A MANUAL

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HINDOO LAW.

CHAP. I.

THE LAW AND ITS SOURCES.

1. The laws of the Hindoos are ascribed by them to divine origin. One portion thereof is designated *Sruti*, or that which is heard. It comprehends the Vedas, which concern chiefly religion, and are believed to be recorded in the very words of Brahma. Another portion is termed *Smruti*, or that which is remembered. It comprises the Dharma Sastra, or forensic law, and is considered to have been communicated through inspired writers (I. 315. C; Morley I. CLXXXVIII). Law heard and remembered.

2. The *Smrutis* are thus the original text books of the law. On these, Glosses or Commentaries have appeared; and Digests have been prepared embracing the whole system of law, or portions thereof. These two latter sources of information are termed *Vyakhyana* and *Nibandhana Grandha* (I. XI; Morley I. CXCII). Text books, Glosses and Digests.

3. The *Smrutis* are enumerated variously at 20 or 36.

Of these the Institutes of Menu are of the highest authority and the earliest in date. The work has been translated by Sir William Jones. The other *Smrutis* resemble that of Menu in form and doctrine, but none are now entire but Menu's work. Menu is the authority for the earliest age, or the *Krita Yuga,* and each of the other *Yugas* has its appropriate *Smruti.* Usage has however interfered with the precepts of the *Smrutis,* and time has rendered their language obscure. Hence the Commentaries and Digests are now looked to as the true expositories of the law (I. XII, XIII; Morley I. CXII—CXCIV, CCI).

The five schools of Law.

4. In process of time there have been formed various schools of law, each adhering preferably to some particular commentator. There are five such schools, namely the Gouda, or that of Bengal; the Midhila, or that of North Behar; that of Benares; that of the Mahratta country; and the Drauvida school, or that of Madras. In point of doctrine these schools differ but little, with the exception of that of Bengal which stands distinguished by several peculiarities, especially in connexion with the law of inheritance (Morley I. CLXXXIX—CXCI).

Schools of Benares and of Bengal.

5. The school of Benares is the foundation of the Midhila, Mahratta and Drauvida schools. Thus the interpreters of the law are found ranged under two great divisions, that of Bengal and that of Benares. In the

Bengal school the letter of the law is modified by inferential reasonings, while in the Benares school the text is more closely followed (II, 316, 317. C).

6. The subjoined are the authorities chiefly accepted in the school of Madras, the practice of which forms the subject of the present Manual.

Chief authorities in school of Madras.

(i.) MITACSHARA, also called Vignaneswareyum from its author Vignana Yoge. It is a commentary on the *Smruti* of Yajna Vulkia, with citations also from other *Smrutis.* It is divided into three *Kandas,* or parts; namely the *Achara Kanda* treating of social and religious duties; the *Vyavahara Kanda* on jurisprudence; and the *Prayaschitta Kanda* on penance. A section of the second *Kanda* embracing the law of inheritance has been translated by Mr. Colebrooke, and a further portion thereof by Mr. W. H. Macnaughten. The Mitacshara, or Vignaneswareyum, is the great authority in the school of Benares, and by consequence in that of Madras, and the work is so associated with that of Menu, the chief founder of the law, that the two are commonly named together, Menu-Vignaneswareyum, as the embodiment of all law.

(ii.) SMRUTI CHANDRIKA, an exhibition of the purport of the *Smrutis* by Devanna Bhut. This is an especial authority of the Madras school in which it has originated, and stands next in estimation to the Mitacshara. It differs

however in doctrine from the Mitacshara in some few points.

(iii.) SARASWATTEE VILASA, a similar treatise to the Smruti Chandrika. The author's name is Prathapa Roothroodoo.

(iv.) VYAVAHARA MAYOOKHA, a treatise on civil and criminal jurisprudence by Neelakantha. It is an especial authority of the Mahratta school and has been translated by Mr. Borradaile.

(v.) MADHAVEUM, so called from its author Madhava Charya. It is a comment chiefly on the *Smruti* of Parasara.

The above five works are accounted paramount authorities, and are referred to accordingly as the *Puncha Grandhi,* or five books.

(vi.) VARADA RAJEYUM, so called from its author Varada Rajah. It is of the same character as the Smruti Chandrika.

(vii.) SMRUTI MOOKTHA PALUM, also called Vythenatha Deetchetheum from its author Vythenatha Deetchata. It treats of religious observances.

(viii.) NIRNAYA SINDHU, by Kamalakara Bhut. It treats of social and religious duties.

(ix.) MENUVURTHA MOOKTAVALEE, also called Kullooka Bhutteyam from its author Kullooka Bhut. It is a commentary on Menu, and the one in best repute.

(x.) DATTAKA MIMAMSA by Nanda Pundita, and DUTTAKA CHANDRIKA by Devanauda Bhut. These are treatises on adoption and the received authorities on the subject in all the schools. They have been translated by Mr. Sutherland. There are two other works bearing the title of Duttaka Mimamsa, the one by Sri Rama Pundita, and the other by Madhava Charya.

Chief authority in school of Bengal.

7. The great authority of the Bengal school is the DAYA BHAGA by Jimuta Vahana. It is a treatise on inheritance and has been translated by Mr. Colebrooke.

Jaganatha's Digest.

8. Among the modern Digests is that by Jaganatha, prepared under the directions of Sir William Jones and translated by Mr. Colebrooke. It is an ample compilation of authorities, but defectively arranged, leaving it uncertain, among the conflicting opinions collected together, what the real doctrine on any question may be. Its own translator thus condemns it. This work is of the Bengal school.

Obsolete Law.

9. In dealing with the Hindoo law, besides discriminating between the law of Bengal and that of Benares, obsolete law has to be distinguished from that which is current.

Marriages with those of lower castes.

10. In the earliest times it was permitted to Brahmins to contract marriages with females of lower castes. This affected the law of inheritance, the issue having proportionately decreasing shares according to the inferiority of

the castes of their mothers. In the present, or the *Cali* age, this is interdicted, and a Brahmin can marry only in his own caste (I. 39, 40).

Right of primogeniture.

11. There was also the right of primogeniture, entitling the eldest son to a larger share on partition. This rule no longer exists (I. 133, 192, 193).

Twelve manner of sons.

12. There were furthermore twelve manner of sons, six deriving title by birth, and six by adoption effected in various ways. Among the former was the son begotten by an appointed kinsman, termed *Dwyamushyayana,* or son of two fathers, being affiliated by the actual father and the one for whom he was raised up. Now but two manner of sons are acknowledged, namely the son begotten and the son received in adoption by gift, termed respectively *Ourasa,* or son of the bosom, and *Datta,* or one given (I. 75; II. 82. C).

Other points exist.

13. There are other points of obsolete law, but of an immaterial nature.

Law of Bengal and of Benares.

14. The prominent variations of the Bengal law from that of the schools of Benares and Madras are specified in a separate section.

Followers of the law.

15. Besides the followers of the Hindoo religion, the law of the Hindoos is applicable to those of pure Hindoo origin who have become converts to Christianity, or are descended from such converts and adhere to the same faith. The Christian religion not embracing rules for

governing rights on property, and the said converts being without other law, it has happened, naturally, that they have, for centuries past, adopted, as a matter of usage, the law of their progenitors, current in the country wherein they dwell, and have thus fallen under Hindoo law, so far as concerns their property (Judgment of Sudder Court in Reg. A. 187 of 1858).

16. It is also the case that certain adherents to the Mahomedan religion, springing originally on the mothers side from Hindoo stock, termed Moplas, and living in North Malabar, have for centuries followed the nepotismal law of succession prevailing among the Hindoos surrounding them, denominated *Maroomakatyam* (Judgment of Sudder Court in Sp. A. 125 of 1855).

17. Certain of the lower classes of those currently looked upon as of the Hindoo Community, but who from laxity of morals or practice are strictly outcastes, adhere to the Hindoo Law, so far as it suits them, and are thus governed by usage rather than by law.

CHAP. II.

MARRIAGE.

Age of females for marriage.

18. A girl is accounted by law marriageable at the age of eight (I. 36).

19. Girls are however given in marriage at the age of two, and upwards, till they attain their maturity (Vythenatha Deetcheteyam, on text of Prajapaty).

20. A Brahmin girl attaining maturity without having contracted marriage, forfeits her caste (Vythenatha Deetcheteyam, on text of Brihaspaty).

Removal to husband's house.

21. The girl when married remains with her own family until she reaches maturity, when her husband can claim her and remove her to his house (I. 36, 37).

Right of choosing husband.

22. The right of choosing a husband for the girl rests first with her father. Should he have demised, it devolves in succession upon her paternal grand-father, brother, paternal uncle, male paternal cousins, and lastly upon her mother (II. 28, C).

23. If these relatives should have neglected the duty of choosing a husband for the girl up to three years after she may have attained the age of eight, she is at liberty to choose for herself (I. 36).

Time of marriage for males.

24. The three superior classes, namely the Brahmins, or the sacerdotal order, the Cshatryas, or the military

tribe, and the Vysyas, or the mercantile body, may not contract marriage until they have completed the stage of studentship (Menu III. 4), the opening of which period is marked by performance of the *Oopanayana*, or investiture with the sacred thread, and the close by a ceremony termed *Samavurthana*. For the Soodras, or the servile class, who have no stage of studentship, there is no limitation as to the time for marriage.

25. There are eight species of marriage; the *Brahma*, *Daiva*, *Arsha* and *Prajapatya* which are appropriate for Brahmins, and are based upon disinterested motives; the *Gandharva* and *Racshasa*, which are appropriate for Cshatryas, and are founded, the former on reciprocal desire, and the latter on conquest; the *Ausoora*, which is practised by Vysyas and Soodras, wherein the consent of the party giving away the girl is obtained by a pecuniary consideration; and the *Paishacha*, where the marriage may have been effected through fraud practised upon the girl, and which is reprobated for all classes (I. 42, 43; Macnaughten Junr. I. 59, 60). Eight species of marriage.

26. Though each class has its characteristic description of marriage, there is nothing to bind them to the species appropriate to them. A Brahmin, for example, may contract an *Ausoora* marriage, and a Soodra a *Brahma* one (Koollooka Bhut on Menu, III. 24; Judgment of Sudder Court in Sp. A. 193 of 1858).

27. The *Brahma* and *Ausoora* are the most usual species of marriage. The former is an approved one, and the latter, as a sordid proceeding, is disapproved (I. 42, 43; Macnaughten Junr. I. 60).

The binding circumstances in marriage.

28. The binding circumstances essential to the completion of a marriage are gift and acceptance of the girl, and the ceremony termed *Sapthapathi,* or the seven steps. This is performed by the bridegroom placing the bride's foot successively on seven lines drawn on rice in a platter. From this observance has followed the practice of any two persons pledging mutual friendship by taking seven steps together, so that the term *Sapthapathinam* has come to be synonymous with friendship. The ceremonial in question accomplishes the marriage. The other ceremonies observed, including sacrifice by fire *(Homam),* are of minor significance. The tying the *Taly,* or nuptial token, by the bridegroom round the neck of the bride, is a practice sanctioned by usage, but not prescribed in the Sastras (Grooheya Sootrum).

29. The above matrimonial contract in itself fixes the condition of the parties as married, irrespective of the consummation of the marriage when the female, on reaching maturity, is finally taken home by the husband. It brings the girl, should her husband die, to the state of widowhood, with its attendant consequences, and gives her right of inheritance in her husband's family (I. 37; II. 32, 33. E).

30. A breach of promise of marriage does not entail any special consequences. Breach of engagement.

31. If, owing to legal impedement, (such as incurable disease or other defect, or consanguinity within the prohibited degrees), or from the death of the girl, a marriage negociated cannot take place, presents which may have been made to the girl in anticipation of the marriage are to be returned, and the intended husband has to pay the expences incurred on either side (I. 38). If the breach be on the girl's side, without discovery of legal impedement, her family are to bear the expences.

32. When either party incurs forfeiture of caste, intercourse between them ceases; and should the loss of caste be on the side of the female, and she be sonless, she is accounted as dead and funeral rites are performed for her (Smruti Chandrika, on text of Vasista and Yajna Vulkia). If she have a son, he is bound to maintain her, and in this way, under such circumstances, her existence is recognized notwithstanding her loss of caste. Loss of caste.

33. Infidelity in the female, save in certain of the lowest classes, occasions forfeiture of caste and puts an end to the marriage (Smruti Chandrika). The husband, however, is not entitled to damages from the adulterer, the Hindoo law not providing for discretionary damages upon any account (II. 40-44, 265. C. and E). Infidelity in the female.

Grounds for separation.

34. Impotence in the man and confirmed barrenness in the woman, as also loathsome or incurable disease in either, justify separation (I. 47), but will not sever the marriage tie (Menu IX. 79).

Plurality of wives.

35. A man may have a plurality of wives without limit. He ought not however to take an additional wife save under certain justifying circumstances. These are his wife's exhibiting want of chastity; habitual disobedience or disrespect towards him; bad temper; bad health; barrenness; or should she for a period of ten years produce only daughters. The consent of the wife, without any disqualifying causes on her side, also of itself warrants remarriage (I. 45, 46, 52, 53). The absence of these justifying causes will not however invalidate a second marriage (Smruti Chandrika, on text of Devala).

Present on second marriage.

36. Where justification of a second marriage depends upon the consent of the wife, this is to be purchased with a present (Mitacshara II, xi. 34). For this the wife may sue her husband. Proof of misconduct on her part would invalidate her right to such present (Smruti Chandrika, on text of Vasista and Yajna Vulkia).

Residence of superseded wife.

37. A wife who has been superseded by a second marriage, whether justifiably or not, should continue to reside with her husband. If he oblige her to leave him, she should reside with his relatives or her own (I. 54,

55). In either case the husband is bound to maintain her (Smruti Chandrika, on text of Brahaspati).

38. By Hindoo law the re-marriage of a widow is not permissible, save that among the lowest classes of Soodras, who are considered not under the pale of the law, usage has more or less sanctioned the practice. The British Legislature in India have abrogated this law, and have declared such re-marriages, among all classes, valid, and the issue legitimate (Act XV of 1856). Re-marriage of widows.

39. On the re-marriage of a widow, her right of maintenance out of her deceased husband's property, and all right of inheritance to her deceased husband, cease (Sect. II. Act XV of 1856).

40. Among the lower classes of Soodras, marriage with females who have lived in concubinage is allowed (Sudder Pundits, 26th June 1854). Marriage with prostitutes.

41. Among such low castes children begotten before marriage are legitimatized on the marriage of the parents, should the custom of the caste sanction such recognition (Sudder Pundits, 26th January 1854).

42. In the Vellala caste marriage with a female who has been guilty of concubinage is not allowed (Sudder Pundits, 16th May 1855).

43. The contracting parties must be of the same caste (I. 40). Contracting parties to be of same caste.

Degrees of kindred prohibited for marriage.

44. Brahmins are divided into 155 *Gotras* (Dasanirnayam, on text of Aupustumbha), the head or root of each *Gotra* being some particular *Rishi*, or sage. Some families of Cshatriyas trace from the *Rishis* of the Brahmins. The rest, and all the Vysyas, follow the *Gotras* of their *Purohitas*, or family priests. The descent in these several *Gotras* is in the male line exclusively, and females after marriage are transferred to the *Gotras* of their husbands (Nirnaya Sindhu). Intermarriage in their own Gotra has been prohibited to these three classes, (Menu III. 5).

45. The prohibition to the three superior classes against marrying within their own Gotras restrains them from contracting marriage with any paternal relative. As respects maternal relatives, they cannot marry one lineally descended from any ancestor up to the fourth in grade above the mother (Nirnaya Sindhu, on text of Vasista).

46. Soodras, being a class who have no Gotras, are under a prohibition against marriage with any one lineally descended from an ancestor up to the sixth above the father or the fourth above the mother (Nirnaya Sindhu, on text of Vasista).

47. These rules have, however, been greatly relaxed, and ordinarily, among all classes, only paternal and maternal uncles, and brothers and sisters and their descen-

dants, are viewed as within the prohibited degrees (Nirnaya Sindhu, on text of Saktayana, Parasareya, &c.; Kalamrootum 62; Dhurmapravurthy, on text of Vyagrapatha).

Prohibited degrees for person adopted.

48. One who has been introduced into a family by adoption is under the above prohibition as to marriage within both his natural and adoptive family. His progeny are under the like prohibition in both families (Nirnaya Sindhu).

CHAP. III.

ADOPTION.

Liability to place of torment.

49. Among the Hindoos a man who has contracted matrimony is considered thereby to have incurred liability to be transferred after death to a place of torment termed *Put.* From this fate he is delivered by becoming the father of a son. A son his hence designated *Puttra,* or one who delivers from *Put* (Menu IX. 138).

Need to secure a son.

50. The need of a son to a (married) Hindoo is thus apparent; and if not obtained in a natural way the resource is that he should secure one by adoption (I. 76).

Adoption by one whose son has demised.

51. The very birth of a son saves from *Put.* One who has become sonless by the death of his son, though freed from danger of *Put* by the son he has had, may nevertheless adopt a son to perform his funeral rites and keep up his line (Duttaka Mimamsa of Nanda Pundita I. 3, 4).

Funeral offerings.

52. The funeral rites of a man, consisting of offerings of rice balls and water to his manes, are for the purpose of supplying the supposed wants of his soul. In default of male progeny, the widow, brothers, and other relatives, may make these offerings in more or less fulness according to propinquity of relationship. The

son however performs them with the fullest efficacy (Duttaka Mimamsa of Nanda Pundita I. 58, 59).

53. The male progeny of which a man should be destitute to authorise his adopting a son, embraces sons, son's sons, and son's grandsons, these, in failure the one of the other, being on an equality as heirs (I. 78; Sutherland 222). Male progeny to be wanting.

54. Should the male progeny be disqualified from inheriting by loss of caste, insanity, incurable disease, or other cause, they will be considered non-existent and adoption may be made as by a sonless man (I. 77).

55. A second adoption made during the life time of a son already adopted is not valid, the adopter not being in the condition of a sonless man (Moore IV. 102). Second adoption in life time of son adopted.

56. Adoption cannot be made during pregnancy of the wife, as then the prospect of male issue presents itself (Judgment of Sudder Court in Sp. A. 223 of 1859). Even should the pregnancy end in the birth of a daughter, that will not serve to uphold the adoption made before such birth (Sudder Pundits, 8th August 1860). Adoption during pregnancy of wife.

57. Adoption made by a man to replace an adopted son who has demised without leaving male issue is permissible, the condition of the man being the same as that of one whose begotten son has died (I. 78). Second adoption on death of son adopted.

Age of adopter.

58. A married person of immature age may adopt provided he feel his own end approaching (Sudder Pundits, 1st September 1860).

Adoption by unmarried men and females.

59. An unmarried man cannot make adoption (Sudder Pundits, 17th July 1851).

60. Unmarried males of whatsoever age, and females whether unmarried or married, are not in danger of *Put*. No adoption on their account is hence necessary; neither would such adoption be valid.

— by widower.

61. Adoption by a widower is not valid (Dutta Mimamsa of Somanath). His remedy is to re-marry and if necessary then to adopt.

— by person disqualified from inheriting.

62. One disqualified from inheriting, whatever the cause, cannot make adoption, while so disqualified (Mit. II, x, ii).

— by one who is poluted.

63. One under pollution by reason of a death in the family (or other cause) cannot at such time make adoption, he being then incapacitated to engage in the religious rites necessary to an adoption (Sudder Pundits, 23rd March 1857).

— by adopted person.

64. One who has been adopted can himself adopt a son. A family may thus be kept up by a succcssion of adoptions to any extent (Sudder Pundits, 22d December 1845).

— by husband or wife.

65. The right of adoption, as between the husband and wife, vests absolutely in the husband. The adopted

is however son to both his affiliating parents and performs the funeral rites of both (I. 78, 79).

66. A wife or a widow may adopt under authority given by her husband; but the adoption in either case is on the husband's account, and not on that of the wife (I. 79). — by wife or widow.

67. To give such authorization a man does not require the consent of his father or coheirs, notwithstanding that the adoption will affect rights to the joint property (Sudder Pundits, 3d July 1845; 22d June 1850).

68. Direction to the wife to adopt may be given by the husband at any time (Pundits of Provl. Court C. D. 8th March 1825).

69. In granting authority to the wife to adopt it is not necessary that the son to be adopted should be named by the husband (Strange's Reports I. 91).

70. It is not necessary that the authorization should be in writing (I. 80).

71. The authorization may be acted upon by the widow after any lapse of time (Sudder Pundits, 5th Oct. 1845; 17th July 1851).

72. In default of authorization by the husband, his kindred, being the natural guardians of the widow, may empower her to adopt (I. 79, 80); but without due authorization, in one or other of these ways, no adoption made by her will be valid (Judgment of Sudder Court in Reg. A. 18 of 1814).

73. The authorization by a relative of the husband, without the concurrence therein of his coheirs, will not however suffice, they being on an equality with him, and their joint action with him being hence essential (Sudder Pundits, 9th October 1854).

Second adoption by widows.

74. A second adoption, it has been thought, may be made by a widow on the lapse of the son first adopted, should she have received a general authorization to adopt (I. 78; Sudder Pundits, 17th January 1856). This however is a mere opinion unsupported by authority; and it is not one to be accepted in the face of the circumstance that the authorization can have been but for one adoption, and that it was exhausted by the adoption made.

Adoption by minor widow.

75. There is no limitation against a widow making adoption while in her minority. The husband being in *Put*, the necessity for the adoption arises at once. The minor widow in making the adoption should however be supported by the consent of her guardians.

Essentials to adoption.

76. To effect adoption there must be both gift of the boy to be adopted and acceptance of him. The taking the boy in adoption without his having been given will not make a valid adoption (I. 95; Sudder Pundits, 21st January 1844).

Consent of mother not necessary.

77. A father may give his son in adoption without the consent of the mother (I. 81).

78. The mother cannot make such gift of her own authority while the father is living, except in case of urgent need when his assent may be presumed. If, however, the father have demised, or be civilly dead by permanent emigration, entry into a religious order, or loss of caste, the mother is at liberty to make the gift (I. 81, 82; Sutherland 225). Gift of boy by mother.

79. One brother cannot give another in adoption, for brothers stand on an equality and one has no right over another thus to dispose of him (Sudder Pundits, 21st February 1844; Judgment of Sudder Court in Reg. A. 20 of 1851). — by brother.

80. In like manner an uncle cannot give a nephew in adoption (Pundit of Zillah Court of Chittoor, 23d Oct. 1829). — by uncle.

81. It follows that the parents, primarily the father, and failing him the mother, can alone dispose of a boy in adoption. — by parents.

82. The child to be adopted must be of the same caste as the adopter, else he will not be competent to perform the funeral rites of the adopter, or to inherit his property (I. 82); neither would he save him from *Put*. Boy to be of caste of adopter.

83. He should be of the same Gotra, or family, as that of the adopter; but this is not imperative (II. 98, 99. C. and E.; Sutherland 223, 224).

Degrees prohibited for adoption.

84. According to an original text the child to be adopted should be such as may be looked upon as "the reflection of a son." This is held to mean "the resemblance of a son," or such a one as the adopter might have legally begotten (Duttaka Mimamsa of Nanda Pundita V. 16); that is one whose mother he might have legally married (I. 83; Sutherland 223).

85. Pursuant to this rule a brother, a paternal or maternal uncle, or a daughter's or sister's son, could not be adopted (I. 83).

Adoption of daughter's or sister's son.

86. Soodras are however specifically exempted from this rule in so far that they may adopt daughter's or sister's sons (I. 83. 84).

87. All classes may make such adoption in emergency (Pro: of Sudder Court, 4th and 25th June 1836).

88. The custom of making such adoption, even without emergency, prevails in the Presidency of Madras, (Pro: of Sudder Court, 4th and 25th June 1836).

89. This usage is upheld by the Vyavahara Mayookha (Sudder Pundits, 25th Feb., 1839) and the Vythenatha Deetcheteyam (Senior Sudder Pundit, 16th May 1855).

— of brother.

90. The adoption of a brother is invalid (Judgment of Sudder Court in Sp. A. No. 20 of 1851).

— of wife's brother.

91. The adoption of the wife's brother is however valid (Judgment of Sudder Court in Sp. A. 97 of

1856). This is warranted by usage, and may be justified by the circumstance that the adoption is made to the husband, not to the wife ; so that it is his relatives within a particular degree that are barred from adoption, not her's.

Prohibited degrees summed up.

92. The conclusion to be drawn is that the adopted must be one whom the adopter might have legally begotten, save that in the Madras Presidency usage has sanctioned the departure from the rule to the extent that there a daughter's or a sister's son may be adopted; and that Soodras any where may make adoption of a daughter's or a sister's son; and other classes any where on emergency arising.

Adoption of eldest or only son.

93. The adoption of an eldest or only son is prohibited (I. 85).

94. This prohibition has however been considered only directory, and however blameable in the giver to have parted with his eldest or only son, the adoption of such a one, if made, has been held to be valid (I. 87 ; Pro : of Sudder Court, 31st July 1824, and 28th July 1825).

It has also been laid down that the prohibition in question does not extend to the adoption of the eldest or only son of a brother who would stand as *Dwyamushyayana*, or son to both parents, the natural and the adoptive father (I. 86).

There are serious objections to these limitations of the prohibition under consideration. As the very birth of a son delivers the father from danger of *Put*, the eldest or only son, as he comes into the world, secures this deliverance to his parent. The son can however secure no more. The efficacy of his birth has been expended on his natural father, and it is not available for another. He cannot effect a second deliverance from the danger of *Put* in behalf of another. Neither can the benefit, already insured, be withdrawn from the natural father and conferred upon another. The adoption of an eldest or an only son would hence avail nothing to deliver the adoptive father from *Put*. The adoption would fail in its essentail use and be for this cause void. And as respects the exception in favor of the adoption of the eldest or only son of a brother on the ground that he becomes *Dwyamushyayana*, or son to both parents, this form of son, however constituted, belongs, it must be observed, to the obsolete law. Neither has the adoption of an eldest or only son prevailed to such an extent as to establish the practice as a recognized usage. It is of rare occurrence. It has been attempted to Support such adoptions or the principle that "a fact cannot be altered by a hundred texts" (Daya Bhaga II. 30), but this maxim is accepted only in Bengal, and is utterly alien to the Benares school. The

conclusion hence is that the prohibition against the adoption of an eldest or an only son is absolute, and that such adoption, under whatsoever circumstances made, is void.

95. Subject to the above restrictions, the nearest male relation is the most appropriate object for adoption. This would be the son of a brother of the whole blood. Such selection is merely recommended, not imperatively enjoined (I. 84, 85). Preferable subject for adoption.

96. An illegitimate son, being out of the pale of caste, may not be adopted (Sudder Pundits, 18th July 1853). Adoption of illegitimate son.

97. The adoption of daughters is not recognized (Pro: of Sudder Court, 23d November 1847), for a daughter cannot save from *Put* (Koollooka Bhut on Menu IX. 133). — of daughters.

98. A dancing girl, however, may make adoption of a daughter, if authorized thereto by the Pagoda to which she is attached. She cannot do so of a son (Sudder Pundits, 12th Sept. 1853). Adoption by dancing girl.

99. Dancing girls form an exception in the Hindoo community. They do not marry, but live in professional concubinage, which does not degrade them from caste if not carried on with an outcaste. Having no husbands, adoption cannot be made in that channel. They are consequently allowed to make adoption themselves for transmission of their property, and this must

be of a daughter as the descent from a female is in the female line. To adopt, the dancing girl must accordingly be daughterless. It is immaterial whether she have a son or not.

Period for adoption.

100. On adoption being made by a widow in the behalf of her deceased husband, it is not necessary that the boy to be adopted should have been born, or even conceived, during the life time of her husband (Sudder Pundits, 8th Oct. 1849 ; 10th July 1851).

—before performance of Oopanayana.

101. Among Brahmins, Cshatriyas, and Vysyas a boy cannot be adopted on whom the ceremony of *Oopanayana*, or investiture with the thread, has been performed (Judgment of Sudder Court in Reg. A. 18 of 1814).

102. This ceremony, as before observed, marks the entry of the boy on the grade of *Brahmachary*, or student of the Vedas. The term *Oopanayana* signifies "drawing near"; that is to study. Other observances, such as tonsure, are associated with this ceremonial, but the occurrence of these will not bar adoption since they may be re-performed in the adopting family. The *Oopanayana* cannot be undone or repeated, and its occurrence presents an absolute bar to adoption.

103. *Oopanayana* should be performed among Brahmins within the age of eight, among Cshatriyas of eleven, and among Vysyas of twelve (Judgment of Sudder Court in Reg. A. 18 of 1814).

104. The *Oopanayana* not attaching to Soodras, the limit for adoption with them is their marriage. A Soodra cannot be adopted after he has contracted marriage (I. 91). —before marriage.

105. As the state of marriage follows that of studentship it is apparent that no married person, of whatsoever caste, can be taken in adoption (I. 35, note, and 91).

106. An adoption need not be made in writing. There should be attendance of relations and notice to the ruling local authority, and also sacrifice, oblation and prayer; but the non-observance of these formalities will not invalidate an adoption; saving as respects the *Dutta-homam* or sacrifice by fire. With this exception gift of the adopted and acceptance of him, manifested by some overt act, are alone absolutely essential to effect adoption (I. 93. 97. II. 114 E). Form of adoption.

107. Omission of the *Dutta-homam* will invalidate an adoption made by the three higher castes. Soodras are not under the rule.

108. There is in the present age no other valid form of adoption than that by free gift of the boy adopted. The obtaining a boy by purchase is for example unlawful, and an adoption so brought about will not stand (I. 75; II. 133, 188—193).

Attendance of wife. 109. It has been ruled that since the giver and the acceptor are the principal persons, the presence even of their wives is not essential (Judgment of Sudder Court in Reg. A. 8 of 1839). The presence of the wives is however needed because of the performance of the *Dutta-homam,* as they must take part in religious observances with their husbands (Mitacshara II. I. 5).

When not to be challenged. 110. The legality of an adoption cannot be challenged by one who has consented to the adoption (Judgment of Sudder Court in Sp. A. 28 of 1859).

111. The statute of limitations is applicable to bar a suit raised to challenge an adoption (Judgment of Sudder Court in Reg. A. 49 of 1853).

Right of the adopted. 112. Adoption takes the adopted out of his own family and makes him son to his adoptive father in all respects as if naturally born to him (I. 41, 94).

113. Right of inheritance in the family of his adoptive father, both lineally and collaterally, belongs to him (I. 97). He at the same time loses all right of property in his natural family (Menu IX. 142).

114. The Sudder Pundits hold that on the exhaustion of the male issue of his natural father he will succeed to his natural father's estate (27th August 1857). But this doctrine has been disallowed by the Sudder Court (Judgment in Sp. A. 192 of 1855).

115. On adoption being made by a widow, the proper-

ty of the deceased husband passes at once from her to the son adopted (I. 101).

116. The adopted daughter of a dancing girl is not entitled to share her property during her life time (Sudder Pundits, 10th September 1857).

117. The adopted son cannot contract marriage in the family of his adoptive father within the prohibited degrees (I. 41). Neither can he do so in his own (Nirnaya Sindhu). Prohibited degrees in marriage of the adopted.

118. He cannot adopt his natural brother, the consanguinity not being removed by his adoption (Judgment of Sudder Court in Sp. A. 27 of 1858). In like manner is he precluded from making adoption of any other member of his natural family whom he could not, by reason of consanguinity, have adopted had he remained in his natural family. — in his making adoption.

119. The severance of the boy from his natural family by gift made of him for adoption is so absolute that he cannot be re-attached to his natural family, or be re-admitted to his rights of property therein, even should his adoption into the adopting family not stand good in law. Being devoid of inheritance in either family he remains a charge upon his adopter for maintenance (I. 82). Position of one whose adoption is invalid.

120. A valid adoption once made cannot be cancelled (II. 111, C). Adoption cannot be cancelled.

Son born after adoption.

121. On a son being born naturally to a man after he may have taken one in adoption, the adopted son receives but a fourth share (Elberling 71; Mitacshara I. xi, 24); that is a fourth of what forms the share of the son begotten. The property is divided into five parts of which the adopted-son gets one and the after born son four (Judgment of High Court in Reg. A. 51 of 1861).

122. This proportion would be kept up, however many the after born sons might be (Senior Sudder Pundit, 1st September 1853).

CHAP. IV.

GUARDIANSHIP.

123. Minority ceases at the age of sixteen (II. 76. C). Period of minority.

124. It does so as respects females as well as males (Sudder Pundits, 19th June 1855).

125. But in so far as regards the operations of the Court of Wards the Legislature have enacted that minority shall endure till the age of eighteen (Section IV Regulation V. of 1804).

126. The natural guardians of a minor are, first his father; then his mother; elder brother; paternal relatives; and maternal relatives. If a guardian have to be appointed, this must be by the ruling power which is competent to supersede any natural guardian (Macnaughten Junior I. 103, 104). Guardians.

127. The Sudder Pundits accord to the maternal relatives the right of guardianship before the paternal relatives (16th March 1859). They have no direct authority for this view. Finding a text pointing out that affectionate relatives should be the guardians of a minor, and assuming that the maternal relatives will possess more regard for him than will the paternal relatives, they conclude that the minor and his interests

should be committed to the maternal relatives. The opinion is evidently one formed upon mere surmise, and on weak grounds, and it should not prevail to overthrow the natural rights of the paternal relatives.

128. Should the father be incompetent to the guardianship of his son, as from idiotcy, the office will devolve upon the mother (Pro: of Sudder Court, 18th September 1843).

129. The law makes no provision for the appointment of a guardian by testament (II. 73. C).

Acts of a minor.

130. The acts of a minor in regard to property are not valid (Mitacshara on Judicature and Law).

Acts in behalf of a minor.

131. No act in regard to the property or liability of a minor is valid but such as may be clearly one of necessity, or for the benefit of the minor (Koollooka Bhut on Menu VIII. 27).

Responsibility of minor.

132. A son is not responsible for his father's debts until he may have reached his majority (II. 279. C).

The Courts however allow of suits being prosecuted against minors, or maintained by them, through their guardians (II. 80 C).

Share of minor in joint property.

133. The guardian of a minor may sue on his behalf for allotment to him of his share in family property, provided there may have been malversation of the estate to the prejudice of the minor's interests ; but not otherwise (Judgment of Sudder Court in Reg. A. 49 of 1850).

134. Women are considered to be never fit for independance, but are to be under a continual state of tutelage (I. 244; Macnaughten Junior I. 104). Tutelage of women.

135. In certain of the labouring classes as washermen, cowkeepers, toddy drawers, musicians, oilmongers, &c., the women who contribute to the maintenance of the family may contract obligations, (if for the uses of the family), and render their husbands liable for the same (Smruti Chandrika on text of Yajna Vulkia and Nareda). Exception among certain classes.

136. An unmarried female of whatsoever age is under the guardianship of her father, and failing him of his kindred (Macnaughten Junior I. 104). Unmarried females.

137. A married female is under the guardianship of her husband, and failing him of her sons, sons' sons, and sons' grandsons; her husband's heirs generally; her paternal relations; and her maternal relations (Macnaughten Junior I. 104). Married females.

138. A female in management of a minor's property is subject to the control of those who are her guardians (Macnaughten Junior I. 103). Practically the Courts do not require assurance of the support of the guardian to acts by a female of mature age, and would not hold invalid such acts by reason of the concurrence of the guardian being wanting thereto. Female manager of minor's property.

CHAP. V.

PROPERTY.

Definition of property immoveable and moveable.

139. Property is distinguished according as it is immoveable (*Stavaram*) or moveable (*Jungama*). Land, houses, tanks, rivers, and whatsoever cannot be removed, or only so by an act of destruction, are accounted immoveable property. All other property is ranked as moveable. Of tenures on land, such as are of a permanent nature, as right acquired by sale or gift, or on perpetual lease, constitute immoveable property. So also do fees or perquisites due under a permanent title, and which are designated *Nibandha*. Mortgages and terminable leases class on the other hand as moveable property. Produce, wild beasts or birds, and fish, though associated with property held on permanent tenure, are ranked as moveables.

—ancestral and self acquired.

140. Property is again distinguished according as it is ancestral or self acquired. Whatever, whether immoveable or moveable, has been derived by inheritance, or obtained by means of patrimonial funds, is ancestral property. That which has been obtained by individual exertion, unaided by ancestral funds, is viewed as self acquired.

141. That which comes by gift, made freely and not

in return for benefit bestowed out of the ancestral funds, is self acquired (Elberling 92).

142. Property lost by an ancestor and recovered by individual exertion without aid from patrimonial funds, is self acquired. The recovery should, however, have been made with the privity of the coheirs, or under circumstances showing they had abandoned their claims on the property recovered. If made in anticipation of their intention to recover it, this will be held to be in fraud of their title, and property so recovered will rank as common to the coheirs, and not as self acquired (I. 195, 217).

143. Property acquired by means of any art or science inculcated by parents is accounted to have been obtained by ancestral means, and is viewed as ancestral property, although gained by individual exertions (Pundit of Zillah Court of Tinnevelly, 17th August 1821). This is a subtlety of the law so difficult to apply without violence to equity and expedience as scarcely to be carried out in practice.

144. Ancestral property is subject to distinction according as it may be held in common among the coheirs, or have been divided among them. Preserve or it was and divided.

145. Property is furthermore subject to distinctive laws if it vest in a female, whether married or unmarried. It is known as *Stridhana* or "woman's property." The term is not a technical one but merely descriptive. *Stri*- — vesting in women.

dhana embraces property of every description obtained by the female, by gift from her husband or her own or his relations, by inheritance, seizure (taking that which belongs to no one), or discovery (Mitacshara II. xi. 1—3).

146. What, however, she may have obtained by her own exertions, or by gift from other than her relations, ranks not as her property but her husband's (Smruti Chandrika).

147. In that which constitutes woman's property, a distinction obtains of what has been given to the woman, whether it be immoveable or moveable, by her father, mother, or brothers, between the period of her betrothal and that when she is taken to her husband's house (for forms sake) on the completion of the marriage, being usually five days. Over such she has exclusive control without regard to her husband or heirs (Mitacshara II. xi. 5; Saraswatee Vilasa; Vyavahara Mayookha IV. vii. i; IV. x. 8).

Law of limitation.

148. The Hindoo law of limitation of the periods within which rights of property held in abeyance may be recovered by suit has been superseded by the British Legislature (Act XIV of 1859).

CHAP. VI.

ALIENATION.

149. A father who may not have entered upon division of property with his sons cannot alienate immoveable property, whether ancestral or self acquired, without the concurrence of his sons (II. 9, 11. C). Failing sons, the consent of their sons and grandsons will be required, these being also coheirs with the father (Mitacshara I. i. 27). Right of father over immoveable property.

150. If, however, the said male issue should be minors, and the necessity urgent, their assent will be assumed (I. 20).

151. A Soodra father, notwithstanding that his illegitimate sons are in the line of his heirs, may alienate independant of their consent, as it is only subject to his pleasure that they can have a share in his life time (Sudder Pundits, 8th March 1862).

152. A man without male issue may alienate his immoveable property, whether ancestral or self acquired, at will, to the prejudice of all other heirs (II. 436. C).

153. His moveable property, ancestral as well as self acquired, is at his absolute control, whether he have male issue or not (Mitacshara I. i. 24). — over moveable property.

Reservation for maintenance of family.

154. No alienation of immoveable or moveable property is valid unless sufficiency be left for the maintenance of those entitled to support, and for providing for the marriage of daughters, these being fixed charges on the estate (I. 18, 19 ; Sudder Pundits, 10th and 26th April 1852 ; Judgment of Sudder Court in Sp. A. 117 of 1860).

Alienation by coheirs.

155. Other coheirs besides fathers and their male issue cannot alienate the joint property, immoveable or moveable, without mutual consent (I. 19).

156. A coparcener may, however, under peculiar pressure, sell a portion of the common inheritance, but the sale cannot be enforced on any particular portion of the property (Judgments of Sudder Court in Sp. A. 123 and 183 of 1859). The purchaser could only be satisfied out of the share of the vendor, and for this he might bring his action.

157. Where coheirs are minors they will be bound only by necessary acts, or such as are evidently for their benefit (I. 203).

— by divided parceners.

158. After division a coheir may alienate the property falling to his share (Sudder Pundits, 6th November 1833); subject to the restrictions appearing in Sections 149 and 154, above.

— by widow.

159. A widow in respect of property derived by inheritance from her husband is little more than tenant for life and trustee for the ulterior heirs (I. 246).

160. She cannot alienate immoveable property but with the consent of her chief heirs, saving when driven to necessity for the discharge of her husband's debts, her own subsistence, or the marriages of her daughters, (all of which are chargeable on the estate,) or for religious purposes to secure supposed benefit to her husband's soul (I. 246, 247; Elberling 74).

161. A widow, for example, having daughters and daughters' sons cannot alienate with the consent of the daughters only. That of the daughters' sons is also necessary (Sudder Pundits, 3d April 1851).

162. Over moveables she has greater power (I. 247, 248). She may alienate these of her own act (Judgment of Sudder Court in Sp. A. 5 of 1849).

163. If devoid of heirs to the remotest grade, a widow would be under no restriction as to the disposal of her property, however obtained, or of whatever description it might be.

164. Such undoubtedly is the law as propounded by the Pundits and accepted in the Judgment of the Sudder Court in Reg. A. 103 and 136 of 1857. This position has, however, been disallowed by the Judicial Committee of Her Majesty's Privy Council in the judgment given by them on the 21st December 1861 in appeal from the above decision (Collector of Masulipatam *v.* Cavaly Vencata Narainapah).

The Privy Council observe that a widow takes but a qualified proprietorship; that she is to live the life of an ascetic, and may not deal freely with her property for self indulgence &c.; that in common with all Hindoo women she is always to be under tutelage, being never considered fit to exercise independance; that failing her own connections and relatives she is to be under the protection of the Sovereign; that she always holds a restricted estate; and that when she has no heirs to restrain her the Sovereign has the power to do so. They hold, consequently, that an heirless widow cannot alienate to the prejudice of the Sovereign's right of escheat.

It is certainly novel doctrine that the Sovereign, in view of his power under escheat, can do more than take possession of property without an owner; and that, as if a true heir, he can challenge the act of the last incumbent in assigning away the property. But beyond the objection arising from the general doctrine of escheat, the decision of the Privy Council, which is more an argument than a construction of the law, will not stand the test of the written law.

" The term heritage *(Daya),*" says the author of the Mitacshara, " signifies that wealth which becomes the " property of another solely by reason of relation to the " owner." Again, " Heirless property (*Adayikam*; that

"is without a *Dayi*, or heir), or wealth which is without "an heir (*Dayadi*) to succeed to it goes to the King" (Mitacshara I. i. 2 ; II. i. 27). Again, Madhaveum lays it down from a text of Brihaspati that "a widow is pre- "cluded from alienating the real property by gift, sale, "or otherwise, without the consent of the heirs" (*Dayadies*). Mayookha and Smruti Chandrika hold the like doctrine from the same text. It is clear, therefore, from these passages, that the restriction upon the widow is in protection of the *Dayadies*, simply ; namely those interested in the estate by reason of relationship to the one from whom the property is traced, and that it is not laid upon her in protection of those rights accruing to the sovereign, not as one of the heirs in any sense, but as coming in when there are no *Dayadies* or heirs; that is, as a stranger.

165. During the life time of her husband the property of a female is subject to his control, saving her *Soudayaca* which she may dispose of at will (Smruti Chandrika). Wife's property.

166. In holding dealings with regard to her *Soudayaca* the wife must however act through her husband, and he is bound to fulfil her wishes (Saraswatee Vilasa).

167. Property, whether immoveable or moveable, vesting in unmarried females, cannot be disposed of by them but with consent of guardians. Alienation by unmarried females.

— by persons under legal disability.

168. No alienation is valid on the part of one labouring under disability from idiotcy, lunacy, minority, imbecility whether arising from age or disease, duress, or the influence of some over-ruling passion such as lust or hatred (I. 23).

CHAP. VII.

WILLS.

169. The power of disposing of property by will is unknown to Hindoo law. No term exists in the Dharma Shastra, or primitive law, for such an instrument as a will. The best European authorities, Sir William Jones, Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange concur in regard to this fact (I. 254, 255; II. 419, 428, 431).

Wills unknown to Hindoo law.

170. The law has left no pretence of need for such an arrangement as bequest by will. It has rigidly provided for the descent of property to the remotest kindred, and eventually for escheat, and has secured maintenance for all members having claim to support (I. 254, 255).

No occasion for wills.

171. If contrary to the law a will is invalid. If in conformity therewith it is unnecssary (II. 421. E).

172. The Hindoo cannot by Hindoo law, administered on Hindoo principles, intercept the inheritance by will (I. 130).

Against the principles of the law.

173. The British Legislature has placed the subject in a dubious point of view. It acknowledges that wills are instruments unknown to Hindoo law, and remedies an error in a previous enactment founded on oversight of the fact. It at the same time does not declare that wills

Wills recognized by the British legislature.

by Hindoos are to be entirely ignored, but provides that they shall have no legal force, except in so far as their contents may be in conformity with Hindoo law (Regulation V. of 1829).

— by the Courts.

174. All the Chief Courts, namely the Privy Council and the Supreme and Sudder Courts, have recognized wills by Hindoos (I. 268, note; Morley I. 612—618).

Extent of power of bequest.

175. The argument in favor of countenancing wills by Hindoos is that a man may bequeath by will what he could make gift of in life. It is to this extent that the power of bequest has been allowed (II. 436, 445. C. and S).

Judgments in favor of wills.

176. The practice of the Sudder Court of Madras in respect of admitting the power of a Hindoo to devise property by will has varied.

There are two judgments by this court upholding wills. The first was passed in Sp. A. 3 of 1824. The property then in issue was self acquired, and the court affirmed the will because the Testator could have alienated it in his life time. The other judgment was given in Reg. A. 43 of 1849. This decision was passed by a single judge, confessedly ignorant of the law. He sought to guide himself by authorities, but found them conflicting. Supporting himself by the opinion of the Pundits, and a judgment by the Calcutta Supreme Court, affirmed by the Privy Council, he upheld the

will then in issue, which appointed trustees to the Testators property to the prejudice of his widow. The Pundits then applied to are the same who have since declared that no Hindoo can make a will, and they explain that they gave the opinion rested on in the above case under the idea that they were called upon to test the will by the power the Testator had to deal with the property during his life time, in the manner he had done by will.

There are three judgments by the same court in which it is indicated that the power of a Hindoo to devise by will would have been admitted had the wills then in question not exceeded the power the individuals making them had to alienate when in life. These were given in Reg. A. 16 of 1860, and Sp. A. 65 of 1844 and 352 of 1860.

There are also two judgments by the Privy Council connected with wills, arising on cases decided in the Sudder Court of Madras. In the first of these judgments the will which forms the subject of the decision of the Sudder Court in the first named case Sp. A. 3 of 1824 was in question, but the suit, which was a fresh one that had sprung up between the parties subsequently to the said decision, turned, not on the validity of the will, but on the power of the Testator to alienate, as he had done, during his life time, a portion of his pro-

perty without the consent of his wife (Moore II. 54). The other judgment was in affirmation of the decision of the Madras Sudder in the second of their cases above noticed, namely Reg. A. 43 of 1849. The Privy Council, in this judgment, after noticing Sir Thomas Strange's observation that the Hindoo language has no term (meaning no technical term) whereby to express what is known in England as a will, argue that "it does "not necessary follow, that what in effect, though not "in form, are testamentary instruments, which are only "to come into operation and affect property after the "death of the maker of the instrument, were equally "unknown." They then remark on the prevailing recognition of wills in Bengal, and add, "even in Ma-"dras it is settled that a will of property, not ancestral, "may be good,—and indeed the rule to that extent is "not disputed in this case" (Moore VI. 345).

Certainly this decision will not stand the test of examination. Had there been instruments of the description supposed by the Privy Council, some trace thereof would have appeared in the numerous law treatises of the Hindoos, nor would the instrument, or the act, have been left without a name. Equally unwarrantable is the assertion that wills of any sort are recognized throughout Madras. The Privy Council, in making this assertion, must have had in view, promi-

nently, the operations within the limits of the late Supreme Court, an area embracing but 27 square miles out of the 115,000 square miles forming the Presidency.

There is, however, a sort of testamentary disposition recognized by the Hindoo law which it will be useful to consider.

" The law (a text of Narada's) which says that any
" thing given by a man when in danger of life is no
" gift, is applicable only to cases in which the object of
" the gift was not a charitable one, because Catyana
" says, whatever may be given or promised to be given
" by an individual, whether in good health or in danger
" of life, his son is to be caused to carry out, if he dies
" without giving the same" (Mitacshara on substrac-
" tion of gift).

Here we have a recognition by the law of the limits within which a Hindoo may exercise the testamentary power, and a declaration that beyond these limits he has no such power. He may make a charitable provision, but none other. And as to this, the effecting it is a matter rather laid upon the conscience of his heir than legally binding upon him. Any other testamentary disposition he may make, or as it is termed gift, is no gift.

The real state of the law has thus not been examined, or understood, in any of the above judgments. They

have gone upon the assumption, and that of the barest kind, that what a man may do in his life time he may direct to be done after his death. There is no precept to favor such a doctrine, and every provision of the law directly opposes it. A man has certain powers during his life time, but on his death the law takes charge of his property and directs its descent. No where is there an indication that the property can take any other course than that which the law has assigned to it. The descent is as strictly appointed as in the law of entail in England. It cannot be broken but by breaking the law.

The Madras Sudder have, on these grounds, at one period, disallowed the power of a Hindoo to make any disposition of his property by will.

Judgments against recognition of wills.

177. A will is not recognized in Hindoo law. A Hindoo may make gift during his life time, but to constitute a gift transfer must take place. Whatever a man dies possessed of passes to his legal heirs. A will therefore can have no force among Hindoos (Pro: of Sudder Court, 30th July 1855; Judgments of Sudder Court in Sp. A. 169 of 1858 and 107 of 1859).

178. A man may in his life time alienate his property to the prejudice of his widow, leaving her the means of maintenance; but he cannot make arrangement that such alienation shall take place after his death, since his

widow would be entitled to what he died possessed of Sudder Pundits, 19th July 1852).

179. A bequest to a son-in-law to the prejudice of a brother's son, is void (Judgment of Sudder Court in Sp. A. 659 of 1861).

180. The appointment by a father of a guardian to his minor son, is invalid. His rights as to his property die with him, and pass to his heirs (Sudder Pundits, 12th March 1857).

CHAP. VIII.

CHARGES ON PROPERTY.

Nature of charges on an estate.

181. The charges on an estate are the just debts; the obsequial monthly, half yearly, and yearly ceremonies of ancestors; initiatory ceremonies terminating in the *Oopanayana;* marriages; and maintenance (I. 166—171).

Son's obligation to discharge father's debts.

182. According to the law a son is under obligation to discharge his father's debts, whether he have derived assets from his father or not (I. 167). This, however, is a moral and religious, rather than a civil obligation. It can be evaded by relinquishment of the paternal estate (II. 275, 276, C).

183. The courts established by the British Legislature not feeling themselves bound by the above directory precept, and considering it inequitable to enforce it, have ruled that a son is liable for his fathers debts only to the extent of the assets derived by him from his father (Judgment of Sudder Court in Sp. A. 12 of 1851).

Assets may be pursued.

184. The assets of a debtor may be pursued by a creditor into whosesoever's hands they may fall (II. 282, C).

Liability of widow.

185. A widow is not liable for her husband's debts unless she have derived property from him (II. 280, 281, C. and E). The principle is applicable in the case of all other surviving relatives.

186. Where property is held in common, the managing member is answerable for all claims on the family (II. 334, E). — of managing member.

187. The family property is not answerable for the debt of an individual member (Sudder Pundits, 13th November 1854). — of family property.

188. The debtors share in the property will, however, be liable (Judgment of Sudder Court in Sp. A. 113 and 114 of 1855). The creditor would have to sue to have the share set out by partition in order to make it thus available to him. Allowance would first have to be made out of the share for the shares of the debtors male issue, the residue only being available to meet the debt (Mitacshara on substraction of gifts).

189. Where property passes to a widow those succeeding to her are not liable for debt contracted by her, unless of such nature as would have warranted her alienating the property for discharge thereof (S. D. A. VII. 114; Judgment of S. D. A. in A. 179 of 1846). — of widow's heirs.

190. The parties for whose initiatory ceremonies provision has to be made out of the estate are the brothers. Provision for initiatory ceremonies, and marriages.

191. Those whose marriages are to be so provided for are the brothers and the sisters (Mitacshara I. VII. 4. 5).

192. If there be only self acquired property, a brother owning it is bound to provide out of it for the initiatory

ceremonies (but not the marriages) of his brothers, and for the marriages of his sisters (Smruti Chandrika).

193. Provision for the initiatory ceremonies and marriages of sons, sons' sons, and sons' grandsons, and for marriages of daughters, falls on the father.

— in divided families.

194. On division between father and sons each son has to make provision for his own line. In respect of daughters marriages, an amount equal to the fourth of what falls to a son must be left with the father for each daughter's marriage (Mitacshara I. vii. 6).

— for maintenance.

195. The duty of affording maintenance embraces a wider range. The head of the family must support the whole family (I. 67).

196. Besides his personal family, consisting of his wife and children, a man is bound to maintain his father; his father's widows; his grandfather; grandmother; unmarried sisters; widowed sisters who may have no other provision; his illegitimate children and their mothers; those excluded from inheriting by legal disability; and; the widows and daughters of the excluded (I. 67, 132, 171, 175).

197. Also one adopted by him but who may prove disqualified for adoption (I. 82). Such a one is accounted as a slave (I. 112), and being so looked upon it follows that his maintenance must be given him.

198. Also a wife discarded without just cause (I. 46);

but not one who may abandon him without sufficient reason (Judgment of Sudder Court in Reg. A. 2 of 1823).

199. Also a minor wife notwithstanding that she has remained residing with her own parents (Judgment of Sudder Court in Sp. A. 64 of 1858).

200. Also the widow and daughters of a son (Sudder Pundits, 10th April 1845).

201. And a brother's family, if property have been derived from the brother (Sudder Pundits, 13th November 1854).

202. The daughter of a dancing girl, though the direct heir, is not bound to maintain her brothers widow (Judgment of Sudder Court in Sp. A. 88 of 1858).

203. A son's widow is bound to maintain the father (Sudder Pundits, 1st December 1853).

204. Undivided nephews have to maintain their uncle's widow, if sonless (Sudder Pundits, 30th August 1845).

205. By want of chastity a widow forfeits her stated provision of maintenance (I. 172).

206. Subsistence however must be given to her, as also to an adulterous wife (I. 58; II. 39), but this need be but of the poorest kind; and the provision is dependent on the woman abandoning her incontinent course (Sudder Pundits, 19th August 1830; 26th January 1854).

207. The widow's maintenance is to be irrespective

of her individual property. This is on the ground that during her husband's life time she was thus entitled to support (Sudder Pundits, 28th February 1853). A remedy would, however, be afforded in equity, where the circumstances of the widow might place her above the need of such support, and where the exaction thereof might be oppressive.

208. Whoever takes the estate of the deceased, must maintain those whom he was bound to maintain (I. 137).

209. Where there may be no property but what has been self acquired, the only parties whose maintenance out of such property is imperative are aged parents, wife, and minor children (Mitacshara on substraction of gift).

210. Thus where there is no ancestral property a widow is not entitled to look for maintenance from her husband's brother (Judgment of Sudder Court in Sp. A. 142 of 1859).

Residence with maintainer not compulsory.

211. Parties receiving maintenance are not under compulsion to reside with those maintaining them.

212. For example, a widow need not reside with her father-in-law; husband's brother (Sudder Pundits, 16th February 1839; 26th February 1855); son, step son, or husband's relatives generally (Judgment of Sudder Court in Reg. A. 13 of 1817 and Sp. A. 17 of 1846; Pro: of Sudder Court, 18th September 1851).

213. Sons, whether legitimate or illegitimate, need not reside with their father, disobedience not being a ground of forfeiture (Judgment of Sudder Court in Sp. A. 2 of 1821).

Separate maintenance in pauper family.

214. Where the property to be charged is insufficient to provide a separate maintenance, the family cannot be charged with such maintenance (Judgment of Sudder Court in Sp. A. 16 of 1859).

What is embraced as maintenance.

215. The maintenance to be provided embraces what is required for food, raiment, and lodging; and must be apportioned according to the condition of the party who is to receive it, and the circumstances of those who are to provide it.

Law of limitation.

216. A suit for maintenance has been made by the British Legislature unsustainable if not brought within twelve years from the decease of the person whose estate is to be charged therewith, or from the last payment on account of the maintenance. (Section 13 Act XIV of 1859).

Arrears of maintenance.

217. In such a suit arrears are not claimable (Judgment of Sudder Court in Reg. A. 29 of 1858).

CHAP. IX.

DISABILITY TO INHERIT.

Description of persons disqualified.

218. Those who are incompetent to inherit property are idiots; madmen; the deaf, and the blind who are so from birth; the dumb; those so lame as to be unable to walk on either foot, or such as may be without use of both hands; those having disease of an obstinate or agonizing nature such as atrophy and ulcerous leprosy; and the impotent (I. 152—156; Mitacshara II. x. 3).

219. Disease is made a cause of disability from the idea that it is the mark and consequence of sin committed in a former birth (I. 155, 156). Nothing but the removal of the disease will take away the disability.

220. Vice, neglect of duty, and profusion are also held to be disqualifying causes, the latter affecting the party guilty thereof to the extent that he may have dissipated the common means. But these circumstances are of doubtful applicability (I. 157—160).

Forfeiture for crime.

221. The perpetration of crime in general is not to disqualify for inheritance. This alteration in the Hindoo law on the subject arises from the Hindoo criminal law having been superseded by British law, and the offence of the criminal having been adequately provided

for by the latter law, his sentence cannot be enhanced by application to him also of the Hindoo law (Judgment of Sudder Court in Sp. A. 40 of 1858).

222. But where a party has stolen a portion of the common inheritance, he is civilly disabled from claiming a share in the inheritance (Judgment of Sudder Court in Sp. A. 40 of 1858).

223. The deaf, blind, lame, or leprous do not lose their inheritance if their infirmities come upon them after they have obtained the inheritance (Mitacshara II. x. 6). But one becoming mad would at any time be virtually divested, seeing that he would be incompetent for all contracts. The next in his line would exercise the controul. When the causes of disability must have arisen.

224. On the recovery of any of the above from their infirmities their right of inheritance revives (Mitacshara II. x. 7). Revival of right.

225. The causes of disability affect females equally as males (I. 164), saving that barrenness does not disqualify. Both sexes affected.

226. The descendants of a person excluded do not lose their right of inheritance unless themselves personally disqualified (I. 163). Descendants of the disqualified.

227. A devotee does not inherit (I. 164). Devotees.

228. Illegitimate offspring, save among Soodras, cannot inherit (I. 165). Illegitimate offspring.

Out-castes. 229. Loss of caste is a ground of exclusion; but this part of the law has been abrogated by the British legislature (Act XXI of 1850).

Unfaithful wives. 230. An exception should however be made in the instance of a wife proving unfaithful to her husband. By the English law she would be subjected to process of divorce and so lose the right of succession to her husband. By Hindoo law the divorce occurs at once without process. An unchaste wife being therefore in the position of a divorced wife, should not inherit from her husband.

CHAP. X.

PARTITION.

231. Property vests among Hindoos jointly in heirs of parallel grade, and the right of certain co-sharers is kept alive in their issue to a limited extent. Joint right in parallel heirs.

232. Sons have equal right with their father in respect of property derived by the father ancestrally, and failing sons their sons and grandsons. Father and sons.

233. In case of protracted absence unheard of on the part of an individual and his progeny, his rights are kept alive to his sixth male direct descendant (I. 187, 188). Right of absentees.

234. The heirs of parallel grade who are in natural coparcenery are a father and his sons, son's sons, and son's grandsons; brothers, and their sons, son's sons, and son's grandsons; male cousins of male descent; widows of the same husband; daughters; daughters' sons; and daughters' daughters inheriting in the female line. Heirs of parallel grade.

235. Of these the sons, brothers, (Mitacshara I. II. 5), widows (Smruti Chandrika), and daughters when taking from the father (Mitacshara II. ii. 1), inherit equally, or *per capita;* and the son's sons and son's grandsons, the brother's sons, son's sons, and son's grandsons, the cousins (Mitacshara I. v. 1), daughter's sons, daughters taking from the mothers (Mitacshara II. xi. 16), and grand Inheriting per capita and per stripes.

daughters, according to the share of the person through whom they derive the inheritance, or *per stripes*.

Daughters. 236. Daughters, however, take precedence of one another according as they are unmarried, or married; with male issue, or without it; and unendowed, or endowed (I. 138; Mitacshara II. xi. 13).

Succession of coheirs. 237. The male issue of a man, that is his sons, son's sons, and son's grand sons, must have been exhausted before his lapsed share falls to those in parallel grade to himself; that is to his brothers. In like manner daughter's sons must have been exhausted before the lapsed share of the daughter falls to other daughters. In the remaining classes of coheirs the right of one coheir vests in the survivors of the same grade before passing on to the next in the line of descent.

Self acquired property. 238. Self acquired property of a coheir does not vest in his coheirs. It belongs to the acquirer's individual line (I. 120).

239. Brothers consequently may enter into contracts with each other in respect of what each may separately have acquired (Judgment of Civil Court of Coimbatoor in A. 129 of 1852).

240. A father, however, has co-ordinate interest in property acquired by his sons, while living in association with him, unless obtained irrespective of the father or his property, when it will be the sons (I. 63, 64).

241. Where one brother may have acquired property, individually, and then associates another brother with him in developing the same, the latter becomes entitled to a half share in the whole of such property (Judgment of Sudder Court in Reg. A. 187 of 1858).

242. In a family continuing united after the death of the father, the eldest parcener manages the joint property, unless objected to on the score of character (or efficiency) by the others (I. 199). Manager of joint property.

243. The acts of the managing member, when for the uses of the family, are binding upon it, but in making alienation of the property the consent of the coparceners, expressed or implied, is necessary (I. 199, 200). Power of manager.

244. The condition of coparcenery may be broken up by partition of the joint property, each coheir taking his appointed share. The effect of such division is to vest the divided share absolutely in each separate member and in his line after him. Division allowable.

245. Sons may at their will, and irrespective of all circumstances, compel their father to divide with them the ancestral property (Mitacshara I. v. 8). Power of male issue to compel father to divide.

246. Sons who have demised being represented by their sons or grandsons, the latter also may force on such division (Mitacshara I. i. 3, 23).

247. Should the father have become a devotee, he is

considered civilly dead, and the sons may proceed to division without him (I. 179).

248. His degradation from caste would operate according to Hindoo law in the same way, but the British legislature have ruled that this circumstance shall not interfere with an individual's rights in property (Act XXI of 1850).

Father and sons to share alike.

249. In coming to a partition of the ancestral property the father and the sons are to share alike (Mitacshara I. v. 5). His self acquired property the father may retain for himself (I. 196).

250. The sons all share alike. Their shares are not governed by the number of the mothers from whom they may have sprung (I. 193, 205).

251. It has been thought that the sons of Soodras share according to their mothers; but the opinion is an erroneous one. The same rule of equality of share for sons prevails for all classes (Judgment of Sudder Court in Reg. A. 20 of 1846).

Sons born after adoption.

252. Where, however, a son may be one by adoption, and there are other sons by birth after the adoption, the adopted son is entitled to but one fourh of what forms the share of each of the after born sons (Elberling 71).

Illegitimate sons of Soodras.

253. The illegitimate son of a Soodra is entitled to half such a share as falls to a legitimate son, daughter, or daughter's son, where there are such (Mitacshara I. xii. 2).

254. Failing son, daughter, and daughter's son, the illegitimate sons come in for full shares in a Soodras property, but their obtaining shares during their father's life time depends upon his pleasure (Mitacshara I. xii. 2).

Resumption of self acquired property.

255. In case of indigency the father may resume the self acquired property given by him in partition to his sons (I. 196).

A single son may divide off.

256. Division may be made in respect of one son only, the rest continuing undivided (I. 193, 194); and in forcing division from the father each son can claim for himself alone, though several may sue jointly for their respective shares.

Renunciation of share.

257. On partition being made, a son, or other coheir, may accept a trifle by way of satisfaction and renounce his share, and his heirs will be bound by his act (I. 195, 207). He cannot, however, make such renunciation unless able to earn his own maintenance (Mitacshara I. ii. 11, 12).

Sons born after partition.

258. Should other sons be born after partition made with the father, their portions are to come from the father's share (Mitacshara I. vi. 2).

259. A son born after partition succeeds to his father's share to the exclusion of the divided sons. But should any of these have reunited with the father they will share with him (I. 182).

Divided sons

260. Should there be no after-born sons, the divided sons inherit the father's share (I. 183).

Father's self acquired property.

261. On partition occurring between the sons (as brothers) after the death of the father, his self acquired property is divisible among them equally as the ancestral property, and their shares in all are alike (I. 208).

Partition after death of each parent.

262. In Menu (IX. 104) it is laid down that after the death of the father and the mother the brothers may divide the paternal and maternal estate. In the Smruti Chandrika it is explained that this signifies not that both parents must have demised before the sons can proceed to make partition, but that the estate of each parent may be divided on the death of each, the one parent not having ownership in the other's property where there are children (I. 204). In partition, however, by sons, of the mother's property, the assumption of course is that there are no daughters, as these would take first (Mitacshara I. iii. 13).

A single parcener may claim his share.

263. Any one parcener may compel the others to relinquish to him his share, the rest remaining united (I. 204).

Power to compel division in behalf of minor.

264. A minor cannot sue for division unless his interests are endangered by waste &c., when a suit for appropriation to him of his share may be brought on his behalf by his guardian (I. 206).

Posthumous son.

265. On division being made after the death of a brother who may have demised without male issue, a share must be taken from out of the divided shares for

his posthumous son, should his widow bear one to him (I. 207. Mitacshara I. vi. 11).

266. The following are illustrations of some of the contingencies of a division among brothers. Certain contingencies of division.

(i.) A, B and C are brothers. A dies leaving three sons, D, E and F. One of these, namely D, dies leaving three sons, G, H and I. The original brothers, B and C, die each having adopted sons, J and K. The family proceed to partition. The property is to be divided into three shares of which J and K are each to receive one. The remaining share is to be divided into three shares of which E and F are each to receive one. The portion still remaining is to be divided into three shares of which G, H and I are each to receive one. Thus J and K each receive $\frac{1}{3}$d of the estate; E and F each $\frac{1}{9}$th; and G, H and I each $\frac{1}{27}$th (II. 312, 313).

(ii.) A, B and C are brothers. A demises leaving a son D who claims and receives his father's $\frac{1}{3}$d share of the property. B and C remain united. B demises without issue. His share vests in C. The divided nephew D has no claim thereon (Pundit of late Zillah Court of Ganjam, 8th February 1806). Had D not divided off previously to the death of B, he would have had half of the lapsed share, together with his father's share, on coming to division with C.

267. Daughters can divide property descending to Daughters.

them in equal shares, as sons (Pundit of late Provl. Ct. S. D. 10th September 1817).

Alteration by partition of line of succession.

268. Partition among brothers will alter the line of succession; but not so among daughters (Macnaughten Senr. 55). For example, on failure of male issue of a brother who has divided off, the right of the female relatives, namely of the widow or the daughters, is brought in. Partition among daughters has no such effect, since, on the lapse of one cosharer, if married her share vests in her own line; if unmarried in her brothers &c. (Mitacshara II. xi. 12, 30).

Mode of effecting partition.

269. Partition may be made by means of arbitrators, by private adjustment, or by casting lots (I. 190). Failing any amicable arrangement, the remedy is a suit to enforce division.

Law of limitation.

270. A suit for partition cannot be maintained unless brought within twelve years from the demise of the persons from whom the property has descended as a joint possession, or from receipt of payment from the property obtained as co-sharer (Sec. 13, Act XIV of 1859). The first clause of this of this enactment will not operate where the property, the partition of which is demanded, vests in more persons than one, whether a father and his sons, son's sons, and son's grandsons, or in brothers and their male decendants, until one and all have demised without male issue, for these are all in coparcenery.

271. In making partition, debts and other charges on the property are to be provided for (I. 191, 192). This may be done by division of the liabilities among the coheirs (II. 283 C), or by special allotment of property to meet the demand, as when provision of maintenance is in question. The creditors, however, would not be debarred by such partition or arrangement from pursuing the whole property.

Provision for charges on estate.

272. A coheir who may have been guilty of profuse expenditure, or who may have dissipated the property by unauthorized alienations, is to have his share diminished by the amount wasted or alienated by him; but should this exceed the value of his share, the surplus is not to be made matter of debt against him (I. 224, 225). His separate acquisitions would, however, be liable.

Remedy in case of dissipation by coheir.

273. One guilty of concealing any portion of the common property with the view of defrauding his coheirs of their share therein, upon division forfeits his share (Mitacshara I. ix. 4—12; Judgment of Sudder Court in Sp. A. 40 of 1858).

— in case of concealment by coheir.

274. A partition once made cannot ordinarily be opened. Where, however, further effects are discovered, which were not embraced in the division made, these may be subsequently divided (I. 230, 231).

Division of further effects discovered.

275. Whenever, from any cause not understood at the time, the division may prove to have been unequal

Re-distribution of shares.

or defective, redistribution of the shares may be made (I. 232). This, however, would be dependant upon mutual consent of the coheirs, unless fraud may have been mainfested when the courts would give a remedy.

Augmentation of common stock and fresh acquisitions.

276. No extra share is allowed to a coheir because of augmentation or improvement made by him of the common stock (I. 213). But should he, by aid of the common stock, have made any distinct acquisition, he is entitled to a double share in the property so acquired (I. 220; Judgment of Sudder Court in Reg. A. 7 of 1814); and this right is kept open for his male issue.

Property lost to family and recovered.

277. Where landed property lost to the family may be recovered by a coheir without aid from the family resources, and made available to the family, the recoverer is entitled to a fourth of such property, as a special remuneration, and the remainder is divisible among himself and the other coheirs (Mitacshara I. iv. 3).

Partial division.

278. There may be a partial division of the property and the residue reserved for future division (I. 195).

Reunion after partition.

279. Parceners may reunite after partition, and there may afterwards be an entirely new partition (I. 233). Such reunion is, however, only permissible between a father and his sons, between brothers, and between a paternal uncle and his nephews (Mitacshara II. xi. 3).

Property not subject to partition.

280. The following descriptions of property are not subject to partition.

(i). Lands endowed for religious purposes, and all things destined to religious uses (I. 208, 210).

(ii). Regalities and ancient zemindaries which have vested in the eldest son (I. 198, 208; Judgment of Sudder Court in Reg. A. 20 of 1846).

(iii). Land specially granted to maintain the rank and dignity of a family (Judgment of Sudder Court in Reg. A. 5 of 1850).

(iv). Zemindaries held under grant from the Government and renewed to the eldest son (Judgment of Sudder Court in Reg. A. 11 of 1816).

(v). Nuptial gifts received by a man with his wife, even although coming out of the joint property (I. 215, 216).

(vi). Clothes and jewels habitually worn, and which belong exclusively to the wearer (I. 211).

Certain sorts of what is divisible.

281. While regalities and ancient zemindaries vesting in the eldest son are not divisible, the personal property of the king or zemindar is so (II. 329, 330, E; Judgment of Sudder Court in Reg. A. 11 of 1816 and 64 of 1848).

282. Jaghires, shrotriums, and dues arising from religious offices are divisible (I. 210).

283. An annuity descending to the sons of the annuitant is divisible (I. 209).

Written deeds of division recom-

284. In order to prevent disputation, and to protect the interest of the respective sharers, there should be

mended. written instruments of division interchanged between the parties coming to division.

285. These should contain specification of the items forming the share of each member, and be attested by kinsmen, or at the least by neighbours (I. 222, 223).

286. Such instruments, however, though desirable, are not indispensable (I. 222).

What constitutes division.

287. The mere execution of deeds of division will not constitute a family a divided one. It is requisite, in order to be viewed as divided, that the parties should have actually entered upon their respective shares (Judgments of Sudder Court in Reg. A. 6 and 8 of 1848).

288. Distribution of the produce, without partition of the land, does not make a family a divided one (Pundit of late Zillah Court of Nellore, 8th October 1824).

289. A party suing for division, and dying while the suit is pending, is held to be still undivided. His widow, consequently, is not entitled to demand his share (Judgment of Sudder Court in Reg. A. 86 of 1854).

290. A decree declaring a party entitled to a share in family property not having been carried into effect before the demise of the party, he is considered to have demised as an undivided member (Judgment of Sudder Court in Sp. A. 68 of 1855).

291. Where there may have been a partial division of the property, and some has been left to remain in common

for a time for the sake of convenience, the parties are to be considered divided, and the widow of a member demising may claim her husband's share in the said reserved portion (Sudder Pundits, 19th April 1855).

292. Where the fact of division is disputed, the presumption is that the family are united, until the contrary be proved, the natural condition of a Hindoo family being that of union (I. 225). Presumption in favor of union.

293. In the absence of direct proof of division, the fact of division has to be judged of on inferential grounds. These are difficult of application. Circumstances indicative of division.

294. A family may be separated as to residence, meals, and ceremonies, and yet remain united in interest. And they may have divided in interest, and yet continue to live and eat together, and to perform their rites in common (I. 225, 226).

295. The performance of separate religious acts; the dressing food separately; the occurrence of mutual loans, sales, purchases, and other contracts between the members of the family; the becoming sureties for one another; the giving evidence for or against each other in regard to property; the understanding of neighbours that they are separated; and the separate receipt of village dues, are circumstances serving to show that division has taken place (I. 227).

296. The religious acts the separate performance of

which is indicative of division must be such as concern the family jointly, not such as rest with a member individually to undertake or not at his pleasure. The circumstance, however, is not of a conclusive nature (I. 227, 228). The family rites are the Sradha, Vyswadawum, and worship of the family deity. The individual rites are the stated oblations at morning, noon, and evening, the Brahma Yajnum, worship of the planets, sacrifice to fire, &c.

297. The joint performance of obsequies does not suffice to prove the parties undivided in the face of positive evidence to the contrary (II. 391, 392. C and E).

298. The instances above specified, one and all, are but evidence. The concurrence of all, however, to constitute proof, is not requisite (I. 228).

299. The instance most to be relied on is the taking food separately prepared while the parties are residing in the same house. This too is but a circumstance and susceptable of being explained away (I. 228, 229 ; II. 397. C).

300. As a purchase of joint property may be made by one parcener from the others, provided all join in the transaction (Judgment of Sudder Court in Sp. A. 88 of 1860), such transaction would be no evidence of division.

CHAP. XI.

SUCCESSION.

What opens out the inheritance.

301. Death, retirement from the world as a devotee, and long absence unheard of leading to presumption of death, open out the inheritance to the heirs (I. 122).

302. Loss of caste operated in the same way (I. 122), but the British legislature have abolished this as a cause to deprive an individual of his property (Act XXI of 1850).

Period of absence raising presumption of death.

303. The period of absence without tidings which is accounted sufficient to raise presumption of the death of the person absent, varies according to the age of the absentee. If when not above 30 years of age when missing, he is held to be dead if unheard of for twenty years, if between 30 and 60 for fifteen years, and if above 60 for twelve years (II. 237, 238. C).

Right of inheritance connected with performance of funeral rites.

304. The right to inherit is connected with the benefits supposed to be conferred on the deceased by obsequial offerings. Those who are in relationship to him to make such offerings are in the line of his heirs. Those who are not so are excluded therefrom (Elberling 67).

305. The performance of the funeral rites by an in-

dividual not in propinquity of relationship to the deceased to qualify him for the act will not confer on him the right to inherit (I. 129, 130).

306. Female relatives, to a very limited extent, may offer funeral oblations. They do so by proxy, it not being permitted to them to recite passages from the Vedas.

Posthumous son can succeed.

307. It is not necessary that the heir should have been actually born when the inheritance falls in. It is sufficient that he should have been begotten and afterwards born with vitality (Elberling 40).

Different grades of heirs.

308. There are three grades of heirs, namely the *Sapindas*, the *Samanodacas*, and the *Bundhus*. The term *Sapinda* is derived from *Pinda*, the funeral rice ball or cake, and it is descriptive of those who participate in offering it to the deceased. These offer also oblations of water. The term *Samanodaca* is derived from *Oodaca*, water. It is descriptive of a remoter grade of relatives who do not offer the rice balls but the water only. *Bundhu* signifies cognate kindred lying beyond the *Samanodacas* (Mitacshara II. v. 6; II. vi). These, as such, make no offerings. On failure however of *Sapindas* the *Samanodacas* make offering of the *Pinda*, or rice ball, as do the *Bundhus* on failure of *Sapindas* and *Samanodacas*.

309. The *Sapindas* are in two grades, the nearer who offer and partake of the rice ball entire, and the

remoter who offer and partake of merely the wipings of the hands. The *Samanodacas* are also in two grades, but there is no distinction between them as to the offerings they make (Menuvurtha Mooktavalee on Menu V. 60).

310. The *Sapindas* extend to the sixth male in direct descent from the person to be traced from, and the sixth male in direct ascent, and the direct male descendants of these latter to the sixth degree. The brothers, it will be observed, and their male descendants to the fifth degree, come in thus as the descendants of the father, or the first in direct ascent. The wife, daughters and daughter's sons, the mother and the paternal grandmother are also embraced among the *Sapindas* (Saraswatee Vilasa; Varada Rajeyum; Smruti Mooktha Phalum), but the female line extends no further. The remotest embraced in the line of *Sapindas* is the great great great great grandson of the great great great great grandfather. Limit of *Sapindas*.

311. The nearer *Sapindas* are the three in direct descent from the person to be traced from, and the three in ascent above him, and their descendants to the second degree (Smruti Chandrika). Also the wife, daughters, daughter's sons, mother and paternal grandmother (Smruti Mooktha Phalum). The limit is the grandson of the great grandfather. The rest are the remoter *Sapindas*. — of nearer *Sapindas*.

— of *Samanodacas.*

312. The *Samanodacas* extend to the sixth male below and the sixth above the male *Sapindas*, and the direct male descendants of the latter six to the sixth degree (Mitacshara II. v. 6; Smruti Chandrika; Smruti Mooktah Phalum).

Participation in funeral offerings.

313. The collaterals in the above list are brought in on the principle that they have some common ancestor with the person to be traced from, to whom they as well as he offer oblations, this constituting participation in offering.

Bundhus.

314. The *Bundhus* are of three kinds; namely such as are in parallel grade to the individual himself, who are the sons of his father's sister, the sons of his mother's sister, and the sons of his maternal uncle; such as are parallel to his father, who are the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle; and such as are parallel to his mother, who are the sons of her paternal aunt, the sons of her maternal aunt, and the sons of her maternal uncle. These stand relatively to each other as above arranged (Mitacshara II. vi).

Order of descent.

315. Property vesting in a person individually descends first to his nearer *Sapindas*, in the following order—

Sons.

Son's sons,

Son's grandsons.
Widow.
Daughters.
Daughter's sons.
Mother.
Father.
Brothers.
Brother's sons.
Paternal grandmother.
Paternal grandfather.
Paternal grandfather's sons (i. e. the uncles).
Paternal grandfather's son's sons (i. e. the cousins).
Paternal great grandfather.
His sons,
and son's sons.

After this the remoter *Sapindas* come in, each in their order; and then the *Samanodacas* in their order; and lastly the *Bundhus* in theirs.

316. It will be observed that the above is the order according to which each class of relatives takes direct from the person to be traced from. It is not an order according to which each succeeds to the other. On the property coming to an individual the descent would begin afresh in his line. For example, should the inheritance devolve on a brother's son, in default of nearer relatives, his heir would not be the paternal grandmother of the

person from whom the property came. It would descend primarily to the new inheritor's male issue, and so onwards. And should it devolve on a female relative, for instance on a daughter, it would go on from her according to the rule of descent in the female line, to be hereafter explained.

Sons. 317. Where the sons may have divided from their father and received their portions, they nevertheless succeed to their father's remaining property as first in descent (I. 183).

318. Should there, however, be sons born after the partition, these succeed to the father's share to the exclusion of the divided sons (I. 182).

319. Sons inherit equally, and not by representation according to their mothers (I. 205). This rule applies to all castes without distinction (Judgment of Sudder Court in Reg. A. 20 of 1846).

320. The claim of primogeniture does not now exist (I. 133), saving that regalities and certain ancient zemindaries vest in the eldest son (Judgment of Sudder Court in Reg. A. 20 of 1846).

Grandsons and great grandsons. 321. Grandsons and great grandsons participate according to the shares of their respective fathers (I. 207).

322. A grandson whose father is dead, and a great grandson whose father and grandfather are dead at the

time the property falls in, inherit at once with any existing son (II. 253. Sricrishna).

323. Should the son, grandson, and great grandson be dead at the time the property falls in, and a great great grandson be left, he will not succeed (save as a remoter *Sapinda*). The inheritance will pass on to the deceased's widow. But should the great grandson have survived and inherit, the great great grandson would come in (direct) as his son (I. 125). Great great grandson.

324. Where, however, the death of the owner is presumed from his long absence unheard of, and his descendants also are absent and unheard of, any of them up to the sixth from him, on appearing, will be entitled to inherit as of the male issue taking precedence of the widow (I. 125, 132). That is, the inheritance is kept open to the remotest *Sapinda* in this branch on the presumption that an intermediate descendant may have survived to transmit it to him. Right of absentees kept open.

325. The share of a son demising before the inheritance falls in, is not kept alive for his widow (II. 231, 232. C. and Dorin). Share of demised son.

326. It has been held that where there may be a plurality of wives, the one first married succeeds to the exclusion of the others, who take after her, each in turn according to order of marriage (I. 136, 137; Judgments of Sudder Court in Reg. A. 5 of 1824 and 1 of 1835). This, Widows.

however, is not the law in Southern India, where the wives are viewed as on an equality and inherit jointly (Mitacshara II. i, a clause omitted between clauses 5 and 6 in Colebrooke's translation; Smruti Chandrika).

327. Widows, however, with issue (daughters) take the real property in equal portions to the exclusion of those without issue. The personal property all share alike (Saraswatee Vilasa).

Daughters. 328. Among daughters, the unmarried take first; after them the married daughters having male issue, or with probability of having it, and the widowed daughters with male issue, all of which three latter classes inherit jointly (Smruti Chandrika).

329. After these the barren married, and the sonless widowed daughters succeed. These also take jointly (Mitacshara II. xi. 13).

330. In each class the unendowed succeed before the endowed (Mitacshara II. xi. 13). What constitutes endowment, such as to postpone right of inheritance in favor of the unendowed, is not said, but it should obviously be a portion sufficient for maintenance.

331. Daughters in each class succeed jointly and share alike (Sudder Pundits, 20th May 1852). This, however, it must be remembered, relates to succession from the father. If succession be derived from the mothers, where the father may have had a plurality of wives, the daugh-

ters take by representation according to their mothers (Sudder Pundits, 3d July 1854).

332. In the line of the daughter's male issue the descent stops with their sons. It does not extend to the female issue (Macnaughten Senr. 6). Daughter's daughters.

333. Daughter's sons participate according to the shares of their respective mothers (I. 145). Daughter's sons.

334. Daughter's grandsons are not in the line of heirs (Judgment of Sudder Court in Sp. A. 246 of 1861). Daughter's grandsons.

335. Among Soodras, on failure of daughter's sons, illegitimate sons succeed (I. 132); that is to full shares. Half shares they are always entitled to. Illegitimate sons of Soodras.

336. In the ascending line the mother takes before the father (Sudder Pundits, 24th December 1838). Mothers.

337. Should the father of the person to be traced from have had other wives besides the mother of the individual, they do not inherit. The property passes exclusively to the individual's mother (I. 144).

338. Among brothers those of the whole blood succeed first; and failing them those of the half blood (I. 144). Brothers.

339. When brothers separate, and afterwards re-unite, and then again come to a partition, should any share have lapsed by death &c. during the state of re-union, such share goes in equal parts to the re-united brothers of the whole blood and the sisters of the whole blood. Failing brothers of the whole blood, it goes to re-united brothers

of the half blood, and sisters of the whole blood, to all in equal shares (Mitacshara II. ix. 13).

Sisters. 340. Sisters are not in the line of heirs (II. 243, 244, C and S), save as to those of the whole blood taking in the above manner.

341. The above position is disputed by the Sudder Pundits who maintain that as sisters and sister's sons may perform the funeral rites of the deceased, they are in the line of his heirs, in default of express heirs (24th Aug. 1859 and 30th October 1861). This doctrine has not, however, been accepted by the Sudder Court on the ground that it rests on inference only, and is opposed to the Mitacshara, where, in the exhibition of the succession to its remotest limits, no place has been given to sisters or their sons (Judgments in Sp. A. 118 of 1858; 107 of 1859; 184 of 1860).

Brother's sons. 342. Among brother's sons those of the whole blood succeed before those of the half (I. 145), and the undivided before the divided (II. 254 Sricrishna). Those in each class share by representation according to their fathers (Mitacshara II. iv. 7—9).

343. The sons of brothers who have demised before the property falls in do not succeed while there are surviving brothers to take the inheritance (Macnaughten Senr. 3; Elberling 78).

Brother's 344. Brother's grandsons are not in the (direct) line

of heirs (Elberling 78), but come in ulteriorly as remoter *Sapindas*. grandsons.

345. Brother's daughters do not inherit (II. 239, 240. S). Brother's daughters.

346. The Sudder Pundits hold that a daughter in law may succeed to her mother in law as she may perform her funeral obsequies. The Sudder Court have disallowed this doctrine on the same grounds that have led them to refuse to recognize sisters and sister's sons as in the line of heirs (Judgment in Reg. A. 33 of 1858). Daughters in law.

347. Where brothers are in coparcenery as an undivided family, the succession differs in certain respects from that which prevails in the instance of property held individually. The estimated share of each brother vests successively in his sons, son's sons, and son's grandsons, as in the case of individual property. Failing these however the next in the line of succession are the surviving brothers among whom the lapsed share vests equally. The great great grandson of the demised brother would not take it unless kept open for him by the survival of his father or grandfather. From the brothers the lapsed share would vest in their male issue as far as the great grandson. After that it would pass to the widow of the last survivor of any of these. The widow of those previously demised would not partici- Succession in undivided families.

pate. When there may be male issue of the undivided brothers, it passes from one cousin to another to the remotest degree while remaining undivided; and on all these failing, then to the widow of the last survivor among them. It finally (Judgment of Sudder Court in Sp. A. 169 of 1858) goes to divided relatives in their order.

348. Distant undivided relatives take before the widow (Sudder Pundits, 12th September 1829).

349. Where there are two brothers who have not divided, and they demise in succession without male issue, each leaving a widow, the widow of the last survivor alone inherits. This is because on the death of the brother who first demised the entire property vested in the surviving brother and so passes on to his widow (II. 231, 232. C. and Dorin).

350. Where one of two undivided brothers may demise leaving a daughter, she does not succeed. The property passes on to the surviving brother and his line (Sudder Pundits, 24th October 1853).

Self acquired property of coparcener.

351. The self acquired property of a coparcener, immoveable and moveable, vests wholly in his male issue as far as the great grandson (Sudder Pundits, 15th June 1838; 7th November 1850). Failing male issue it goes to his undivided brothers and their line (Sudder Pundits, 16th January 1837).

352. The Sudder Pundits hold that the property of an adopted son, on failure of the line of the adoptive family, passes to his natural kindred; and that on failure of the natural line, the one adopted takes the property of his natural kindred. The Sudder Court, however, have not admitted this doctrine, finding it rest upon no specific text, but only on the reasoning of Sri Rama Pundita in his Duttaka Mimamsa, a work of no high authority, while it does not appear in the great treatises on adoption by Nanda Pundita and Devanauda Bhut, and is opposed to the specific authority of Menu, as well as to the fundamental principle of an adoption whereby an irrevocable severance is made between the person adopted and his natural family (Sudder Pundits, 9th October 1855; 27th August 1857; Judgment of Sudder Court in Sp. A. 192 of 1855; Judgment of High Court in Sp. A. 177 and 182 of 1861). Sri Rama, moreover, fails to state the position he would give the party so introduced in the line of heirs. The Pundits would place him above the widow. Wherever introduced, this admission of an heir not contemplated in the Mitacshara would invade the order of descent laid down in that paramount authority. Adopted son.

353. Females inherit only in divided families (Elberling 68), or on exhaustion of male undivided members. Inheritance by females.

354. Property vesting in a female, descends first to her daughters, the unmarried having preference over the Descent of women's property.

married, and the unendowed over the endowed; then to her daughter's daughters; daughter's sons; sons; and son's sons (I. 51; Mitacshara II. xi. 9. 13);—the distinction also prevailing in favor of those who have sons, or may have them, over the sonless (Smruti Chandrika). That which a widow has derived from her husband, on the exhaustion of the above issue goes to his kindred in their order. That which a woman may have received in gift from her own family, returns to the donors, if alive, should her marriage have been of a disapproved species, namely Racshasa, Ausoora, or Paishacha. If the donors are dead, it goes to her husband and his kindred. Should the marriage have been of an approved species, namely Brahma, Daiva, Arsha, Prajapatya, or Gandharva, the above gifts go, not to the donors, but to the husband and his kindred (I. 51; Mitacshara II. xi. 11; Smruti Chandrika).

Women's fee.

355. The woman's fee, or the gratuity given to her on her marriage by the bridegroom for purchase of household utensils, cattle, &c., (Smruti Chandrika; Mayookhum), as an exception goes to her brothers (I. 51, 250).

Property of unmarried females.

356. On a female dying unmarried, any nuptial present she may have received from her intended husband, in anticipation of marriage, is returnable to him, the charges on both sides being first deducted therefrom.

Her remaining property goes to her brothers, and then to her mother and father (Mitacshara. II. xi. 30).

357. Grand-daughters succeed by representation according to their mothers (Mitacshara II. xi. 16). Grand-daughters.

358. On failure of all relatives, property vesting in a male will pass to his preceptor, pupil, or fellow student, each in his order. It then, saving in the instance of Brahmins, escheats to the ruling power (Mitacshara II. vii). Property vesting in a female, saving in the instance of Brahmins, escheats in default of relatives. Descent on failure of relatives.

359. Property vesting in a Brahmin, whether male or female, on failure of relatives, should go to any learned or venerable priest, and then to any pure Brahmin (Mitacshara II. vii. 3—5). The Privy Council have, however, declared that it escheats to the Crown as any other property (Collector of Masulipatam V. Cavaly Vencata Narainapah, 30th July 1860).

The Privy Council first attempt to shake the Hindoo law on the subject, notwithstanding the explicit declaration of Menu, that "The property of a Brahmana "shall never be taken by the king," and that of Narada, "If there be no heir of a Brahmana's wealth, on his "demise, it must be given to a Brahmana. Otherwise "the king is tainted with sin" (Mitacshara II. vii. 5). They argue that the passing of the property to a pure and learned Brahmin involves a right of selection; that

as the taint of sin is laid upon the king unless this appropriation of the property be carried out, it follows that the right of selection is in the king; that the having this right involves a right of possession, at least intermediate; and that therefore "the title of the king "by escheat to the property of a Brahmin dying with- "out heirs ought, as in any other case, to prevail against "any claimant who cannot show a better title." After this they proceed openly to declare that the matter was not to be governed by Hindoo law, but by general law, pursuant to which what becomes without an owner, falls to the Crown.

Thus, by whatever the process, the end arrived at is that what by Hindoo law the king may *never* take, and if he take it is thereby tainted with sin, in the instance of the British sovereignty falls to the Crown, and not to those to whom the law has appointed it.

Property of devotees.

360. The property of devotees, who have withdrawn from all worldly ties, goes to those associated with them in spiritual position. That of the *Brahmachari*, or professed student, is taken by his preceptor. That of the ascetic by his virtuous pupil. That of the hermit by his spiritual brother, that is one who has consented to become a brotherly companion; and, finally, by any one of the same religious institution. The natural kindred are totally excluded (Mitacshara II. viii 1—6).

361. The property of a dancing girl will pass to her female issue first, and then to her male, as in the case of other females. — of dancing girls.

362. On failure of issue the property of a dancing girl will go to the pagoda to which she is attached (Sudder Pundits, 12th September 1853).

363. With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or other, inherit from them (Pro: of Sudder Court, 11th Nov. 1844; S. D. A. VII. 273). Their issue after their degradation succeed. — of prostitutes.

CHAP. XII.

BENGAL LAW.

Dissimilarity of Bengal law with Benares law.

364. The chief points on which the law, as followed in Bengal, differs from that obtaining in the Benares school, and those assimilating thereto, including the Drauvida school, or that of Madras, are as follows.

Authorization of widow to adopt.

365. The assent of the husband's kindred, in default of the authorization of the husband, does not suffice to warrant a widow making adoption (Dattaka Mimamsa I. 18). Opposed to Vyavahara Mayookha IV. v. 17, (II. 92. C.); Duttaka Mimamsa by Sri Rama Pundita.

Father's power over immoveable property.

366. A father may alienate a small portion of the ancestral immovable property at his pleasure (Daya Bhaga II. 24). Opposed to Mitacshara I. v. 9, 10, by which none can be alienated but with consent of the sons.

Illegal alienation.

367. An alienation of property prohibited by law is nevertheless left undisturbed when actually affected, on the principle that "a fact cannot be altered by a hundred texts" (Daya Bhaga II. 30), a doctrine not recognized in the Benares school (I. 23, 24; Smruti Chandrika).

Right of sons in father's property.

368. Sons have not ownership in their father's property, ancestral or other, until after his demise (Daya Bhaga I. 30; II. 9, 11). Opposed to Mitacshara I. i. 3, 23, 27.

369. Sons, consequently, cannot force partition on their fathers, even of the ancestral property. The act depends on the father's pleasure (Daya Bhaga I. 38; II. 20). Opposed to Mitacshara I. ii. 7 (I. 179). Son's right to force partition on father.

370. In coming to a partition of the ancestral property with his sons, the father is entitled to a double share (Daya Bhaga II. 20). Opposed to Mitacshara I. v. 5, which gives like shares to father and sons. Father's share.

371. A son born after partition between a father and his sons is to have his portion allotted to him out of his brother's shares (Daya Bhaga VII. 10—12). Opposed to Mitacshara I. vi. 2, which provides that the portion be taken from the father's share. Portion of son born after partition.

372. The concealment by a coheir of property subject to division is not visited with forfeiture by him of his share therein (Daya Bhaga XIII. 2). Opposed to Mitacshara I. ix. 4, 5. Concealment of property by coheir.

373. Barren and sonless widowed daughters are excluded from inheriting from the father (Daya Bhaga XI. ii. 3). Opposed to Mitacshara II. ii. which prescribes no such exclusion, and II. xi. 13. Barren and sonless widowed daughters.

374. In the ascending line the father takes before the mother, and the grandfather before the grandmother (Daya Bhaga XI. iv. 3, 4). Opposed to Mitacshara II. iii. 5, which gives the rule in the reverse. Right of father before mother.

375. Brother's grandsons are in the line of heirs (Daya Brother's

grandsons. Bhaga XI. vi. 6). Opposed to Mitacshara II. v. 1, which shows them to be excluded.

Sister's sons. 376. Sister's sons are also in the line of heirs (Daya Bhaga XI. vi, 8, 9). Opposed to Mitacshara which excludes them (I. 147), by not entering them as heirs.

Widow of undivided member. 377. The property of a man dying without male issue goes to his widow whether he be divided from his coheirs or not (Daya Bhaga XI. i. 46). Opposed to Mitacshara II. i. 30, which makes the descent to the widow depend on the husband having divided off (I. 121).

Woman's property. 378. Woman's peculiar property, over which she has independant right, is termed *Stridhana* (Daya Bhaga IV. i. 13—20). In Mitacshara II. xi. 3, 5 it is laid down that the term has no such technical meaning, but signifies, according to its etymology, woman's property in general, while her peculiar property is designated *Soudayaca.*

379. Woman's separate property is again subject to distinction according as it may have been the gift of the bridegroom at the time of the marriage, or obtained otherwise. The former is termed *Youtuca* and the latter *Ayoutuca* (Daya Bhaga IV. ii. 13, 14). In the Mitacshara no such distiction prevails.

380. Woman's separate property, if *Youtaca,* goes to her daughters; first to the unaffianced; then to the betrothed; lastly to the married. Failing daughters it

goes to sons (Daya Bhaga IV. ii. 13, 23, 25). Her remaining property goes to her sons and maiden (unbetrothed) daughters equally; failing one the others take; then to the married daughter who has a son, or who may have one; next to her son's son; after that to her daughter's son; then to barren and widowed daughters (Daya Bhaga IV. ii. 9, 11, 12). But should the property have descended to her from her husband it reverts to his heirs, and first to the daughter; and not to her heirs (Daya Bhaga XI. i. 56, 57). Opposed to Mitacshara II. xi. 9, 13, according to which there is no distinction as to descent of woman's property, which of whatsoever sort it may be goes to daughters, (the unmarried taking before the married, and the unendowed before the endowed); daughter's daughters; daughter's sons; sons; and son's sons.

Descent on failure of relatives.

381. In default of the fellow student the property goes to those of the same family name (*Gotra*); then to descendants from the same patriarch; and then to priests and Brahmins of the same village. Afterwards, (saving as to Brahmins,) it escheats (Daya Bhaga XI. vi. 25—27). Opposed to Mitacshara II. vii. 3—6, according to which after the fellow student it goes in the case of Brahmins only to fellow Brahmins, and in the case of other castes escheats.

CHAP. XIII.

MALABAR LAW.

Descent in female line.

382. In the province of Malabar, among the great body of its inhabitants, a different rule of descent prevails from what exists in the other Districts of the Presidency, Canara excepted. The inheritance runs in the female, not in the male line. A man's sons are not in the line of his heirs. His property goes to his sisters; sister's sons; sister's daughters; sister's daughter's sons and daughters; mother; mother's sisters; their children; and to his maternal grand mother; her sisters; and their children. Failing these and their stock in the same way of descent, it goes, as in the other parts of the Presidency, to the man's disciple, and fellow student; and then escheats.

Origin of rule.

383. This rule of descent is termed *Maroomakatayam*, or Nepotism in the female line. The origin thereof is conceived to have been thus. It is alleged that Parasooramen, the first King of Malabar, introduced Brahmins into the district, and give them possessions therein, and to prevent these properties from being split up, decreed that they should vest in the elder brothers, whom alone he permitted to contract marriage. The sons of these were to be accounted as sons for the whole

family. The junior brothers being without wives were allowed to consort with females of lower castes. The offspring of these unions not being legitimate could not take rank as Brahmins, or inherit from their fathers. Their inheritance was hence made to follow from their mothers. The lower castes fell into the same system of promiscuous intercourse among themselves. With them the females, before attaining maturity, go through a form of marriage, the bridegroom not necessarily taking the position of husband. After maturity they may consort with whom they please, and with as many as they please, provided that the connexion be with members of their own or some higher caste. The offspring succeed to the estate in the mother's family, it being obvious that parentage cannot be traced out in the line of the male.

The classes governed thereby.

384. The castes that follow this rule of *Maroomakatayam* are all excepting Brahmins and Aka Podwals, a class of Pagoda servants, the artisans, namely carpenters, brass-smiths, black-smiths and gold-smiths, and some of the lowest denominations, such as the Cheromars, or slave tribe, the Malayers and the Paniars, with whom the rule of descent is to sons. The Teears, or toddy drawers, and the Mookwas, or fishermen, of North Malabar follow *Maroomakatayam*, while those to the South observe *Makkatayam*, or descent to sons. In North Malabar most of the Moplas, although Mahome-

dans, follow also the rule of *Maroomakatayam*, in this respect having conformed to Hindoo usage in the times of the ascendancy of the Hindoos.

United families.

385. The adherents to *Maroomakatayam* form united family communities termed *Tarwaads*. The remotest member is acknowledged as one of the family if living under subordination to the head of the family and taking part in their religious observances. The senior male of whatsoever branch is the head of the family, and is termed *Karnaven*. The other members are termed *Anandraver*.

Succession as *Karnaven*.

386. The position of *Karnaven* belongs to the senior relative of the deceased *Karnaven*, and not to the nearest in blood to the deceased. For example, a mother's sister's daughter's son, being the senior, is preferred to a mother's sister's son (Judgment of Sub. Court of Calicut in Appeal No. 39 of 1843). He would be preferred also to a sister's son who is the nearest in descent.

Division cannot be claimed.

387. The head of the family has entire control over the concerns and property of the family, to which he has to administer for the good of the whole. The unity of the family may not be broken up by any member claiming his share and forcing on a division; or incurring debt and charging this on the property (Judgment of Sudder Court in Reg. A. 28 of 1814; of late Zillah Court of Malabar in Sp. A. 1 of 1842; of Civil Court

of Calicut in A. 36 of 1848; Pro: of Sudder Court, 13th February 1854).

It may occur by consent.

388. Division cannot be enforced by a co-parcener (Judgment of Sudder Court in Sp. A. 4 of 1857), or at the demand of a creditor. The members of a family may, however, by mutual consent, come to a division among themselves, and the Courts would uphold such division. In the event of an individual being wronged on such division taking place, the Courts would furthermore doubtless give a remedy.

The basis of a division.

389. The basis of such a division would be according to the *Taveries*, or branches of the family. That is, the property would be divided primarily according to the number of the sisters of the common ancestor, these giving rise to the branches, and afterwards among their progeny.

Power o *Karnaven* to alienate.

390. The *Karnaven* can alienate all moveable property, ancestral or self acquired, at his discretion. But as to immoveable property, whether self acquired or ancestral, he must have the written assent of the chief *Anandraver*, (Judgment of late Pro: Court Western Division in Reg. A. 27 of 1839; of late Zillah Court of Malabar in Sp. A. 29 of 1840; of Sudder Court in Reg. A. 5 of 1845).

391. The absence of concurrence of an *Anandraven* living in discord with the *Karnaven*, would not, however,

vitiate the act of the *Karnaven* in alienating immoveable property, the rule requiring the assent of the *Anandraver* to such alienation implying that the family is a united one (Judgment of late Zillah Court of Malabar in Sp. A. 29 of 1840).

— to incur loans.

392. A *Karnaven* may raise money on mortgage for the use of the family without the assent of the *Anandraver*. It is only in making absolute alienation that their concurrence is necessary (Judgment of Sudder Court in Reg. A. 5 of 1845).

393. The signature of the *Anandraver* is not required to give validity to bonds executed by the *Karnaven* (Judgments of Sudder Court in Reg. A. 41 of 1846, and Sp. A. 38 of 1852).

Liability of family property.

394. Debts, to be chargeable on the family property, must have been contracted for the uses of the family by the *Karnaven*, or other member managing under his sanction. The debts of individual members cannot be charged on the property (Judgment of Civil Court of Calicut in A. 36 of 1848; and of Sudder Court in Sp. A. 38 of 1852, and 48 and 49 of 1854).

395. The family property is not liable for a debt contracted by the head of the family for his own use (Judgment of Sudder Court in Reg. A. 37 of 1844).

396. The debtors estimated share in the family pro-

perty is not liable for individual debts (Pro: of Sudder Court, 5th August 1850).

397. A debt contracted by a *Karnaven* would be presumed to have been one for the uses of the family, and chargeable on the estate, until the contrary might be shown; and one by an *Anandraven* would be presumed to have been an individual obligation, not so chargeable, unless otherwise proved.

Supersession of *Karnaven*.

398. A *Karnaven* may be superseded for incompetency (Judgment of Civil Court of Calicut in A. 36 of 1848). The causes which will disqualify the Karnaven are loss of caste, old age, deafness, blindness, dumbness, madness, disgraceful conduct, and dissipation of the family means. When put aside, whether by the family or by force of legal measures, he is to be replaced by the next senior competent male member.

Self acquired property.

399. Self acquired moveable property, namely that which is obtained by individual exertion and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it as well as males. On demise it descends in the case of males to their sister's sons, or nearest *Anandraver* (Judgment of Sub: Court of Calicut in A. 320 of 1852), and in the case of females to their issue male and female.

Widowhood.

400. There is nothing analogous to the state of

widowhood as elsewhere existing. Females, whether in alliance with males or not, reside in their own families.

Management of property by females.

401. In theory the property is held to vest in the females only, the males having right of management and claim to support. Practically the males are cosharers with the females. In default of males females succeed to the management of the family property. In some families the management devolves on them preferably to the males, and in such case the senior female takes it.

Maintenance.

402. All members of the family, even the remotest, are entitled to maintenance.

Adoption.

403. On failure of the sister's progeny, male and female, the head of the family may make adoption. The descent being in the female line, the adoption must be of a female. In view of the probable minority of her offspring at the period when the management may fall in, a male, her brother, may be taken in adoption at the same time with herself, in order to afford provision for the administration of the affairs of the family, and for conduct of the religious rites to be observed therein.

The rule of nepotism obtains in Canara.

404. In Canara a similar system of inheritance obtains which is termed *Alya Santan.* As in Malabar, the Brahmins do not follow this rule. In it's details the law of *Alya Santan* corresponds with that of *Maroomakatayam*, saving that the principle that the inheri-

tance vests in the females in preference to the males is in practice better carried out in Canara where the management of property vests ordinarily in the females, while in Malabar the males commonly administer thereto.

CHAP. XIV.

CONTRACTS.

Those disqualified from contracting.

405. A contract cannot be sustained if entered into by a minor, a lunatic, (save when in a lucid interval), an idiot, a person incapacitated by intoxication or extreme disease, or decrepit through age, or when the individual contracting may be carried away by various passions, such as fear, anger, lust, or grief (I. 271, 272).

Contracts under force or fraud.

406. A contract is void if made under force or fraud; nor is advantage to be taken of what was not seriously meant (I. 273).

—for illegal acts.

407. The subject of the contract must be such as the law can recognize, else it is not binding; and what has been given for an illegal act may be required back (I. 274, 275).

Contracts need not be in writing.

408. A contract need not be in writing (I. 277), but the Courts would hesitate to act upon oral evidence merely to an engagement where written evidence thereof was to have been expected.

Cancellation of contract in writing.

409. A contract in writing can only be discharged by cancelment of the document, or by a written acquittance (Judgment of Sudder Court in Sp. A. 127 of 1855).

Deeds not to be varied by oral evidence.

410. Oral evidence is not admissible to vary the terms of a bond by showing that the money for which

it has been passed is payable to another than the person named in the bond (Judgment of Sudder Court in Sp. A. 79 of 1860).

411. In like manner oral evidence to show that a deed of sale is in favor of another than the person named in the deed is not admissible (Judgments of Sudder Court in Sp. A. 26 of 1858, and 23 of 1859).

412. A person who has formally undertaken to execute a matter for another becomes responsible for due discharge of the trust reposed in him, even though no expectation of reward for his services has been held out (I. 284, 285). **Trust without consideration binding.**

413. A person receiving goods on deposit, loan, pledge, hire, or for transport, is responsible for the safe custody thereof. He is bound to exercise due care for the preservation of the goods, and to offer fair resistance to force directed against them. Beyond this he is not liable for their deterioration, or for loss thereof by accident or theft (I. 282, 283, 286, 292, 294, 295). **Responsibility for goods received in charge.**

414. A person detaining goods after just demand has been made for their restitution, or after expiration of the period when he was bound to have restored them, is liable for any loss accruing to the goods in any manner (I. 284, 287). **— for goods over detained.**

415. A thing sold and not delivered is at the risk of the vendor (I. 303). **— for goods sold.**

416. If the buyer refuse to take possession, the contract is at an end, and the seller may proceed to dispose of the article at the risk and loss of the first purchaser (I. 303). It is obvious, however, that in so re-disposing of the article the seller is bound to lose no time and to omit no reasonable effort to secure a fair price.

Earnest money.

417. If earnest money, and not the full price, have been paid, the buyer forfeits the same, should the breach of the engagement be upon his part. Should it be on the part of the seller, he is liable to repay the earnest money two-fold (I. 303).

Law of limitation.

418. The various limits of time within which rights expire if not pursued at law within such periods, have been regulated by the British Legislature in supersession of the Hindoo law of limitations (Act XIV of 1859).

Removal of materials from land leased.

419. If a man build a house on land rented by him (or held by him on mortgage), he may remove the materials thereof at the expiration of his occupancy (I. 294).

Liability of of sureties.

420. Sureties, who have made themselves responsible for the appearance or honesty of a debtor, (not for payment of his debt), are only personally answerable. On their demise their sons are not liable, unless the parents should have received indemnification (I. 301.

421. Sureties for payment, jointly bound, are answerable each to the extent only of his proportion, unless otherwise agreed upon (I. 301).

Ex H G
9/8/28

THE END.

